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REPORTS OF CASES

DECIDED IN THE

APPELLATE COURTS

OF THE

STATE OF ILLINOIS

SUBMITTED AT THE DECEMBER TERMS, 1893 AND 1894, AND THE MAY
TERM, 1894, OF THE SECOND DISTRICT; AND THE MAY
AND NOVEMBER TERMS, 1894, OF THE
THIRD DISTRICT.

VOL. LVI.

REPORTED BY
MARTIN L. NEWELL
OF THE SPRINGFIELD BAR

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These Courts are held by Judges of the Circuit Courts assigned by the Supreme Court for a term of three years. One Clerk is elected in each district.

MARTIN L. NEWELL, Reporter, Springfield, Illinois.

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JUSTICES.

JOSEPH E. GARY, Ashland Block, Chicago.
ARBA N. WATERMAN, " " "
HENRY M. SHEPARD, " " "

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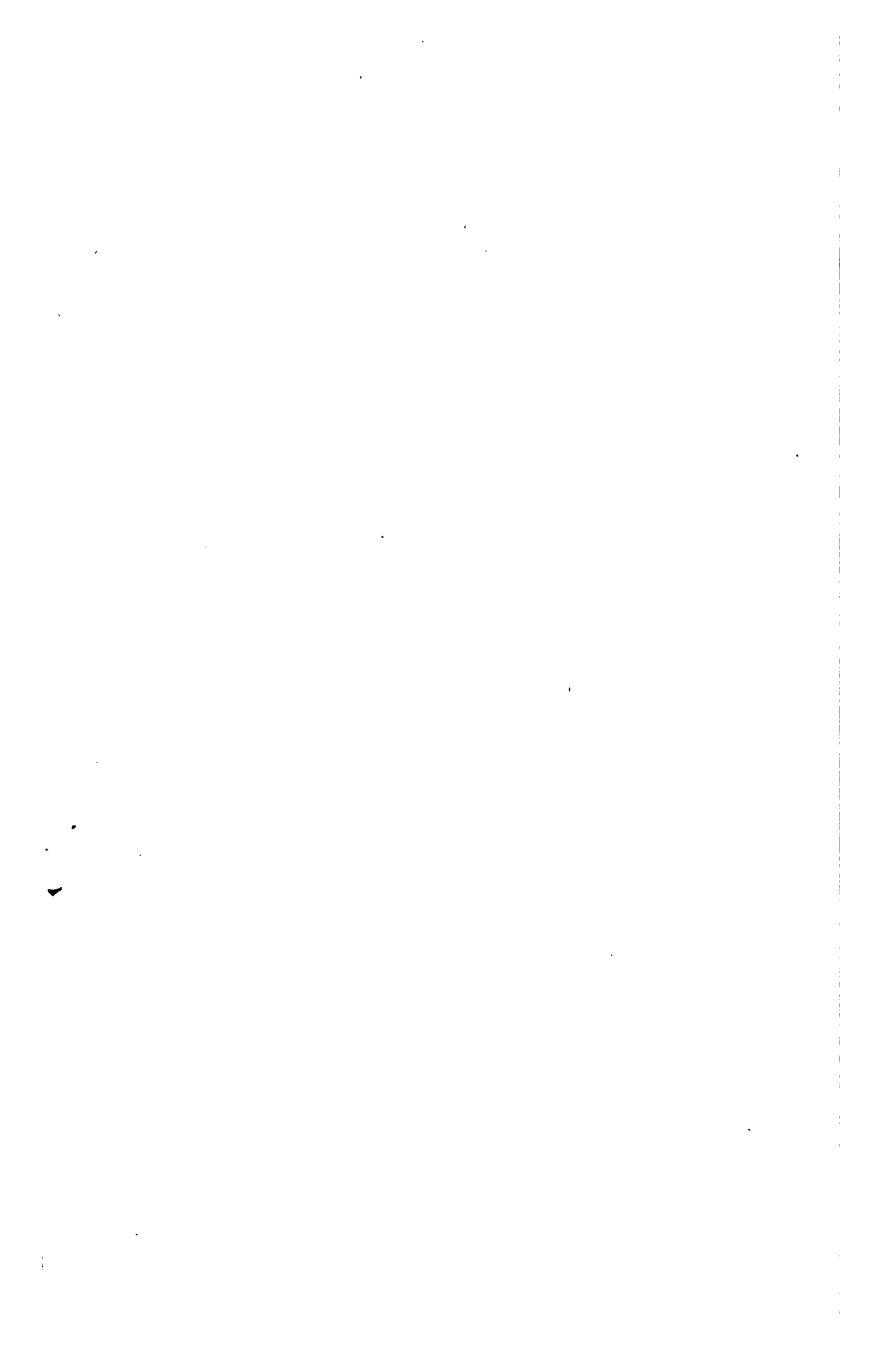


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CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

THIRD DISTRICT—MAY TERM, 1894.

William Claypool v. Allie E. Claypool.

1. SLANDER—*The Word "Bitch" Not Actionable in Itself.*—The term bitch applied to a woman does not, in its common acceptance, imply that she is guilty of adultery or fornication, and is not actionable in itself.

2. SAME—*What the Word "Whore" Implies.*—The term whore does not necessarily imply, in common parlance, that a woman is promiscuous and mercenary in the matter of lewdness.

3. SAME—*Pleading Innuendos.*—Where, in slander, the declaration charged the actionable words to be "bitch" and "whore," an innuendo that the plaintiff had been guilty of mercenary and promiscuous lewdness, is too broad.

Memorandum.—Action for slander. In the Circuit Court of Menard County; the Hon. CYRUS EPLER, Judge, presiding. Declaration in case; pleas of the general issue and justification; trial by jury; verdict and judgment for plaintiff: appeal by defendant. Heard in this court at the May term, 1894. Reversed and remanded. Opinion filed October 29, 1894.

Copy of the Declaration:

Plaintiff alleges that on the 18th day of January, 1894, at said county, in a certain discourse which the defendant had then and there in the presence of divers persons, of and concerning plaintiff, the defendant falsely and maliciously spoke and published of and concerning the plaintiff the false, scandalous, malicious and defamatory words, to wit: "She (meaning the plaintiff) is a dirty little strumpet, and shan't live with Ed (meaning the plaintiff's husband) any more." "She (meaning the plaintiff-

iff) is a damned dirty little whore, and Ed (meaning the plaintiff's husband) shall never live with her (meaning plaintiff) any more." "She (meaning the plaintiff) is a dirty little bitch, and if you had been here a little sooner you would have heard the God damned hussy read my pedigree" (meaning the defendant and speaker's pedigree.) "She (meaning the plaintiff) is a dirty whore, and I intend to run her off the farm." "She (meaning the plaintiff) is a low down dirty little strumpet, and shall never live with Ed (meaning the plaintiff's husband) again;" meaning and intending thereby to charge that the plaintiff was a lewd woman and had been guilty of adultery, and was in the business of having sexual intercourse with men promiscuously for money. Damages claimed \$20,000.

STATEMENT OF THE CASE.

The appellee recovered a judgment against the appellant in an action on the case for slander. The declaration as amended, charged in the usual various forms of expression that defendant had applied the terms whore, strumpet and bitch to the plaintiff, with the innuendo that he thereby meant and intended to charge that the plaintiff was a lewd woman and had been guilty of adultery, and was in the business of having sexual intercourse with men promiscuously for money. The defendant pleaded the general issue and special pleas of justification, charging the plaintiff with lewd acts with certain men named, and with others whose names were unknown.

To these special pleas the court sustained a demurrer and required them to be amended so as to aver that the lewdness therein set up as a justification for the speaking of the words in the declaration alleged was for hire.

The jury found for plaintiff and assessed the damages at \$5,000. Judgment was rendered accordingly.

APPELLANT'S BRIEF, T. W. MCNEELY AND BLANE & BLANE,
ATTORNEYS.

"An innuendo is not an averment of facts, but is an inference of reasoning. Its sole purpose is explanatory, and the only question which it raises is whether the explanation given is a legitimate deduction from premises stated, and it belongs to the court." "When improperly framed it may

Claypool v. Claypool.

justify a demurrer." 1 Hilliard on Torts, 364; 2 Greenleaf on Ev., Sec. 417; Brown v. Burnett, 10 Ill. App. 279; Newell on Libel and Slander, 619, 620.

The innuendo can do nothing more than refer back to the facts stated in the inducement. For the truth of an innuendo must always appear from precedent averments, and the inducement and colloquium must warrant the innuendo. Taylor v. Kneeland, 1 Doug. (Mich.) 67; Newell on Libel and Slander, 619.

An innuendo means nothing more than the words "*id est*," "*scilicet*," or "meaning," or "aforesaid," as explanatory of a matter sufficiently expressed before. Rex v. Horne, 2 Cowper 688; Reg v. Virrier, 4 P. & D. 161.

In McLaughlin v. Fisher, 136 Ill. 111, on page 116, the court said:

"It is not permissible to enlarge and extend the meaning of the words spoken beyond their natural import, by the innuendo, except so far as such enlarged meaning is warranted by prefatory matter set forth in the inducement or colloquium. An innuendo is properly used to point the meaning of the words alleged to have been spoken in view of the occasion and circumstances, whether appearing in the words themselves, or extraneous, prefatory matters alleged in the declaration. It is explanatory of the subject-matter sufficiently already stated and it can not extend the natural meaning of the words unless there is something averred in the prefatory part of the declaration for it to explain, or to which it may properly extend them." Newell on Libel and Slander, 619-630; McLaughlin v. Fisher, 32 Ill. App. 54; 1 Hilliard on Torts, 370; Townsend on Slander, Secs. 335, 336, 337; McCuen v. Ludlam, 2 Harr. 12; Dorsey v. Whipps, 8 Gil. (Md.) 457; Patterson v. Wilkinson, 55 Me. 42.

The word "bitch" as set out in the declaration not being actionable *per se*, could not be rendered so by the innuendo without a prefatory averment of specific facts which would make it slanderous. Roby v. Murphy, 27 Ill. App. 394; McLaughlin v. Fisher, *supra*; Newell on Libel and Slander, 161-162; K—— v. H——, 20 Wis. 252; Frank v. Dunning,

38 Wis. 270; Shurick v. Kollman, 50 Ind. 336; Townshend on Slander, 336.

As to the actionable words "whore" and "strumpet" no innuendo was necessary, although the appellee is bound by it as to the meaning of appellant in using the words. As to the word "bitch" the innuendo was useless without the necessary preceding inducement pointing the meaning of the word as slanderous. But in either case the innuendo could not be proven, for it does not present an issue of fact. Its truth or falsehood is never a question of fact for the jury, and an issue taken upon its truth is immaterial. Fry v. Bennett, 5 Sandf. 54, 7 Eng. 625; 1 Hilliard on Torts, 364; Newell on Libel and Slander, 156-157.

In actions for defamation witnesses can not be allowed to testify as to the meaning which they understood the defamatory matter to convey. Newell on Libel and Slander, 308.

When words are *prima facie* defamatory no parol evidence is admissible at the trial to explain their meaning. Carroll v. White, 33 Barb. (N. Y.) 615; Brittain v. Allen, 3 Dev. (N. C.) 167; Levi v. Milne, 4 Bing. 195; Odgers' Libel and Slander, 106.

It is now well settled that in an action for slanderous words the words are to be taken in their usual, general, popular and natural sense. 1 Hilliard on Torts, 274.

A witness may testify to the words as spoken, together with all attendant circumstances and connections, the extrinsic facts, and after having done so it is for a jury to determine from the evidence who was meant and what was meant. Van Vechin v. Hopkins, 5 Johns. 211; Gibson v. Williams, 4 Wend. 320; Snell v. Snow, 13 Met. 278; Rangler v. Hummell, 37 Penn. St. 130; White v. Sayward, 33 Me. 322.

APPELLEE'S BRIEF, CHARLES NUSBAUM AND H. W. MASTERS,
ATTORNEYS.

Appellee contended that the word "bitch" is actionable as set forth in the declaration.

In the case of Roby v. Murphy, 27 Ill. App. 394, the court

Claypool v. Claypool.

held in that particular case that the word "bitch" of itself was not actionable, but in that case there was nothing in the declaration to show in what sense it was used.

In the declaration it is alleged that defendant "falsely and maliciously spoke and published of and concerning the plaintiff, the false, scandalous, malicious and defamatory words, to wit:" * * * "She (meaning the plaintiff) is a dirty little bitch," "meaning and intending thereby to charge that the plaintiff was a lewd woman and had been guilty of adultery, and was in the business of having sexual intercourse with men promiscuously for money." Appellee contended that the meaning ascribed to the word "bitch" in this case makes it actionable. As was said by Parke, B., in *Hawkinson v. Bilby*, 16 M. & W. 442, in reply to counsel who had quoted from Starkie on Slander, page 44, "The drift of Mr. Starkie's remarks is to show that the effect of the words used, and not the meaning of the party in uttering them, is the test of their being actionable; that is, first ascertain the meaning of the words themselves, and then give them the effect any reasonable bystander would affix to them. A man must be taken to mean what he utters." *Nelson v. Borchenius*, 52 Ill. 236.

It is insisted by appellant that the trial court committed error in allowing witnesses to testify as to the meaning which they understood the defamatory matter to convey, and in support of this position refers the court to Newell on Libel and Slander, 308; but Mr. Newell on page 311 of his book says, that the law is unsettled on this subject, and the rule in Illinois is "that the words must be construed in the sense which hearers of common and reasonable understanding would ascribe to them." "It may well be asked," says Lawrence, J., in *Nelson v. Borchenius*, *supra*, "what better guide there is in that inquiry than to ascertain how they were really understood by the bystanders. The essence of the inquiry is the effect created by the slanders upon the minds of the hearers.

To be excessive, damages must be so exorbitant as to shock the sense of the court, and satisfy it, after making a just allowance for difference of opinion among fair-minded men,

that they can not be accounted for except on the theory that, in the particular case, the proper fair-mindedness was wanting. Newell on Libel and Slander, Sec. 87, p. 911.

A judgment of \$20,000 was sustained in the case of McLean v. Scripps, 52 Mich. 214.

A verdict of \$4,000 held not excessive. Blakeman v. Blakeman, 31 Minn. 396.

MR. PRESIDING JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

It will be noticed that by the innuendo the words charged are made to signify that the plaintiff was a lewd woman, that she had been guilty of adultery and was in the business of having sexual intercourse with men promiscuously for money, and the pleas of justification were required to meet this entire charge.

The term "bitch" applied to a woman does not in its common acceptance imply that the designated person is guilty of fornication or adultery and is not actionable *per se*. Roby v. Murphy, 27 Ill. App. 394.

The term "whore" does not necessarily imply, in common parlance, that the woman referred to is promiscuous and mercenary in the matter of lewdness. Under our statute it is actionable to falsely use words which in their common acceptance charge a person with fornication or adultery, and that is all that was necessarily implied by the words alleged in the amended count.

The innuendo was, therefore, too broad, and the theory upon which the case was put to the jury, that proof of any set of words alleged would warrant a recovery, unless it was shown that the plaintiff had been guilty of mercenary and promiscuous lewdness, was unsound, and was prejudicial to the defendant.

The damages are, in our opinion, excessive. It is unnecessary to discuss the evidence, but having carefully read it we are of opinion that in view of all the facts, the sum awarded is much too high, and that the jury were probably carried away by feeling or by some erroneous consideration. The judgment will be reversed and the cause remanded.

Shaw v. Camp.

Catherine Shaw et al. v. William M. Camp, Executor.

56	93
84	475
84	476
56	23
90	669
56	23
2098	*591

1. **TAXES**—*When an Executor or Administrator May Pay.*—A tax assessed and due at the death of the testator, may be properly regarded as a debt against the deceased, and as such, paid by the executor or administrator; but taxes accruing after the death of the owner stand upon a different footing and are to be paid by the heir, legatee or devisee.

2. **EXECUTORS AND ADMINISTRATORS**—*Claims by, When Not Favored in Law.*—Allowances in favor of executors and administrators for personal expenses incurred in going to consult attorneys, and claims of like character, are not favored in law, and are to be subjected to the closest scrutiny.

3. **EXECUTORS**—*Duty in Will Contests.*—In a contest relating to the validity of a will, the person by it appointed executor is bound on every principle of honor, justice and right to defend it; to do otherwise would be a gross dereliction of duty. The employment of counsel is indispensable to the proper discharge of this duty, and their reasonable fees ought to be regarded as a proper charge against the property of the estate.

4. **COSTS**—*In Contesting a Will.*—The general rule that costs in chancery proceedings may be adjudged by the court according to the right and equity of the cause, is applicable to the contest of the validity of a will.

Memorandum.—Exceptions to an executor's report. In the Circuit Court of Piatt County, on appeal from the County Court; the Hon. FRANCIS M. WRIGHT, Judge, presiding. Exceptions overruled; error by plaintiffs. Heard in this court at the May term, 1894, and affirmed. Opinion filed October 29, 1894.

S. R. REED and BUCKINGHAM & SCHROLL, attorneys for plaintiffs in error.

WILLIAM G. CLOYD, attorney for defendant in error.

MR. JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

Exceptions exhibited against certain items in the annual report of the executor of the last will of Edward Swaney, deceased, came by appeal into the Circuit Court of Piatt County and were there overruled. This is a writ of error sued out to reverse the action of the court thereon. The first exception questioned the power of the executor to pay

taxes upon the real estate of the decedent. The taxes paid by the executor had been assessed upon property owned by the testator on the first day of May, 1890, and were due and payable at the date of his death, which occurred on the 12th day of January, 1891. Taxes so assessed and due, may, we think, be properly regarded as a debt against the deceased, and as such, paid by the executor or administrator. Schouler on Executors and Administrators, Sec. 428; 25 Amer. and Eng. Ency. of Law, page 282, and authorities cited in note 3. Taxes accruing after the death of the owner stand upon a different footing and are to be paid by the heir, legatee or devisee. In the case of Stark et al. v. Brown et al., 101 Ill. 400, cited in support of a contrary conclusion, the taxes paid by the administrator had been assessed upon the land after the death of the owner. In the case of Stone v. Wood, 16 Ill. 177, the question presented was, whether the judgment of the County Court allowing the claim of a creditor of the deceased was conclusive upon the heir when the administrator applied for a decree to sell the land of the deceased to pay such claim, and it was only in arguendo that the court said an administrator was not bound to protect the real estate nor authorized to pay taxes upon it. Phelps v. Funkhouser, 39 Ill. 401, involved the power of an administrator to bring suit to remove clouds or incumbrances from the lands of his intestate. The court declared that such power did not exist, and by way of argument said, "he (the administrator) has no power nor is he bound to protect the estate in any manner, not even to the extent of paying taxes assessed against it;" and cited Stone v. Wood, *supra*, in support of the position assumed. The precise question presented in the case at bar did not arise in either of the cases cited, and there was no occasion for the court to consider a distinction which we think is to be drawn between the liability of an estate for payment of taxes due at the time of the death of the testator and taxes accruing after his death. Sec. 232, Chap. 220, R. S., entitled Revenue, authorizes county authorities to institute and maintain an action of law against the owners of lands forfeited for non-payment of taxes, costs,

Shaw v. Camp.

etc. This remedy is to be employed against the person who owned the land on the first day of May in any year for which the taxes were assessed. If the executor had not allowed and paid this claim for taxes a judgment under the provisions of this statute might, had the lands become forfeited, have been awarded against the estate upon the proper application of the county authorities. This being true, payment without litigation ought to be regarded as within the power of the executor and he entitled to credit therefor.

The second exception is directed against an allowance made in favor of the executor for his personal expenses incurred in going to Champaign to consult attorneys, whom he had employed to defend a claim filed in the County Court against the estate, and to defend a suit in the Circuit Court brought to contest the will of the testator. Allowances of this character to executors or administrators are not favored and are to be subjected to the closest scrutiny. They are easily subverted to improper ends or made the means of absorbing or wasting the effects of an estate. In the case at bar the total amount allowed is not large, and was only sufficient to reimburse the executor for sums actually expended, "for money out of pocket," as it is sometimes expressed. The order granting the allowance specially provided that the amount allowed "shall be subject to be taken into account hereafter by the County Court in its discretion in fixing the compensation of the executors. We do not think that the evidence sustains the charge made by the plaintiffs in error that the expenses were unnecessarily incurred, or that the executor acted in bad faith in defending the claim or the will, or was endeavoring to waste the estate, and upon the whole are inclined to agree with the conclusion of the Circuit Court that the executor ought to be reimbursed by the estate for the expenditures in question. But the chief contention arises under the third exception, which challenged the legality and propriety of the action of the court in allowing the executor the sum of \$603, paid by him to the legal firm of Gore & Philbrick for services rendered by the firm in a suit in chancery brought to contest the validity of the will of the testator.

It is not urged that the amount paid is excessive or unreasonable, but the position of the plaintiffs in error is "that the contest of the will was a contest between the heirs of Dr. Swaney (the testator), complainant, and the relatives of his wife, beneficiaries under the will, defendants;" that the litigation was between beneficiaries, and that the executor had neither right nor power to involve the estate in a contest which properly belonged to the heirs, legatees, devisees and beneficiaries of the deceased. When the will was presented in the Probate Court, it was questioned whether a certain sheet of paper presented therewith, was a part thereof. This sheet made bequests to Norman H. Camp. The County Court held that it was not attested as required by law and rejected it from probate. The will, which consisted of an original will and a codicil thereto, was admitted to probate, and the defendant in error duly appointed executor according to its provisions. He accepted the trust reposed in him by the deceased, and took the oath of office as executor, as required by law, and undertook faithfully to discharge the duties of the trust. Subsequently the legal heirs of the deceased filed a bill in chancery to contest the validity of the will upon the grounds that the testator had not sufficient mental capacity to execute the instrument. The bill made the executors and legatees and beneficiaries under the will, as probated, defendants thereto, and made Norman H. Camp, the beneficiary under the provisions of the rejected sheet, also a defendant. We think the duty of the executor as to the course to be pursued with relation to this suit is well announced in *Pingree v. Jones*, 80 Ill. 177, where it was said: "In a contest relating to the validity of a will, as this was, the person by it appointed executor is bound on every principle of honor, justice and right, to defend it. He owes this at least to the memory of the dead, who placed this confidence in him. This will has been duly proved, without opposition and in the proper court, and the executor was bound to carry out the commands or resign. To do otherwise would be a gross dereliction of duty."

We are aware that many respectable authorities an-

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nounce a contrary view, and are also advised that our own Supreme Court in *Moyer v. Swygart*, 125 Ill. 276, declared that the rule stated in *Pingree v. Jones*, *supra*, that a judgment for costs should not be rendered against an executor, though unsuccessful in defending an attack upon the will, had been modified in *Shaw v. Moderwell*, 104 Ill. 64. The conclusion that we reach from a consideration of all these cases is that while the rule announced in *Pingree v. Jones*, *supra*, that an executor can not be held liable individually for costs, is a general rule, it is not an inflexible one, but may in any particular case be departed from, if the peculiar circumstances of the case warrant such a course, as, if an executor act in bad faith, or is personally interested in the result of the contest and make the defense for his own protection or advantage, or other like reason. The general rule that costs in chancery proceedings may be adjudged by the court according to the right and equity of the cause is applicable to the contest of the validity of a will and its application may operate in particular cases to modify the rule laid down in *Pingree v. Jones*, *supra*. We are, however, disposed to accept the ruling of the court in that case, as to the duty of an executor to defend the validity of the will after its admission to probate, provided, of course, that he does so in good faith for the purposes of carrying out the wishes of the intestate, and is not moved thereto by any improper motives. It is not alone out of the respect to the memory of the dead, that courts should declare it to be his duty to defend the will, but the rule is one in which all living men are interested as a general principle and doctrine of the law.

The power to dispose of one's property by will, is an important and highly cherished right, and is so recognized throughout the enlightened world. The law should give every living man the assurance that his will, if so far executed in compliance with law as to be admitted to probate, shall be carried into effect, and if attacked, will be defended by the person to whom he has committed the duty and power of executing his last wishes and desires. The executor, in

the case at bar, defended the attack made upon the will as admitted to probate. He left to the beneficiary under the provisions of the sheet rejected from probate the burden of defending, as to his interest. The Circuit Court saw nothing to warrant the finding that the executor was prompted to defend from improper motives and in this we concur. The duty of the executor was imperative. The employment of counsel was indispensable to the proper discharge of that duty and the reasonable fees of such counsel ought to be regarded as a proper charge against the property of the estate. We concur in the judgment and order of the Circuit Court and the same is affirmed.

James B. Scott et al. v. Albert C. Burnham.

1. **BANKING**—*What is Not a Banking Business.*—The act of having a deposit in a Chicago bank, and drawing checks thereon in payment of obligations, and buying checks or exchange from other banks or persons to replenish the deposit fund in the Chicago bank, is not transacting the business of a banker within the interdiction of a bond that the obligor would not engage in the banking business at a place named, during the period of five years.

Memorandum.—Action of debt. In the Circuit Court of Champaign County; the Hon. FRANCIS M. WRIGHT, Judge, presiding. Declaration on a bond not to engage in the banking business, etc.; pleas denying breaches, etc.; trial by jury; verdict and judgment for defendant; appeal by plaintiff. Heard in this court at the May term, 1894, and affirmed. Opinion filed October 29, 1894.

J. L. RAY and J. S. WOLFE, attorneys for appellants.

GERE & PHILBRICK, attorneys for appellee.

MR. JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

This was an action in debt by appellants to recover damages for an alleged breach of a bond executed by the appellee, by the conditions whereof he obligated himself, under a penalty of \$10,000, that he would not individually or jointly

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with any other person or persons engage in the business of banking in Champaign, Illinois, during the period of five years from and after the 12th day of November, 1878. The declaration was filed on the 12th day of October, 1892, nearly nine years after the expiration of the period during which the appellee was, by the bond, interdicted from banking. Five breaches were assigned, the first averring in general terms that the appellee, jointly with other persons, his partners in the real estate and loan business, engaged in the business of banking in Champaign within the prohibited time, and the other breaches assigned the commission of specific acts of banking. The appellee pleaded the performance of the condition of the bond, and denied each alleged specific act charged by the declaration. A trial of the issues before a jury resulted in a verdict and judgment for the appellee, to reverse which this appeal is before us. It is complained that the court ruled improperly in behalf of appellee as to the admission of testimony, and misdirected the jury by improper instructions.

We do not deem it necessary to discuss these complaints for the reason that a careful consideration of the evidence on behalf of the appellants has convinced us that the evidence in behalf of appellants standing alone was wholly insufficient to warrant a verdict in their favor, and was not in any respect aided by testimony produced by the appellee.

The parties were members of a private banking firm in Champaign, Illinois. The appellee sold his interest to the appellants and obligated himself by the bond in suit not to engage in the business of banking for five years in that city. Before the execution of the bond appellee was a member of a firm engaged in the business of selling real estate and loaning money on lands. After the execution of the bond he remained a member of such last named firm, and certain transactions of that firm in the course of the business constituted the alleged breaches of the bond. There is no proof tending to show that this firm was in any way advertised or held out to the public as a banking institution or as desiring patronage in that line of business, or that it received money

on deposit subject to check, or loaned money except upon landed security, or discounted commercial paper or bought or sold drafts in the course of business as a banker, or in any way engaged in competition with appellants in the business of banking within the ordinary meaning of the term. The real estate firm kept a deposit account with a bank at Chicago for the transactions of its own business, and drew checks thereon when necessary in the management of its affairs. The obligation of the bond did not require the appellee or the firm of which he was a member to deposit its funds, buy exchange from or transact its banking business with appellant's bank, but left him and it at perfect liberty to become the customer of another bank in Chicago or in Champaign or elsewhere. The only interdiction is that appellee, individually or jointly with other persons, should not engage in the business of banking.

Having a deposit account in Chicago and drawing checks thereon in payment of the firm obligations, and buying checks or exchange from another bank or person to replenish the deposit fund in the Chicago bank, was not transacting the business of a banker nor within the interdiction of the bond. Nothing beyond this was proven by the evidence in behalf of the appellants.

The verdict returned by the jury should have been returned had the appellee introduced no proof and the court given no instructions.

The proof upon the part of the appellee had no tendency to aid the cause for the appellant. Hence, the appellant ought not have recovered upon the merits, and that being so, the judgment must be affirmed.

**Henry S. Clark v. Jacob Y. Wallick, Rebecca J. Wallick,
Francis M. Wright, A. J. Shepley and
Simeon H. Busey.**

1. CONVEYANCES OF REAL PROPERTY—*Sufficiency of Description.*—A description of premises in a mortgage, aided by that in a deed referred to in the mortgage for greater certainty, even if defective, sufficiently de-

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scribes the premises to put all persons upon inquiry and to charge them with notice.

2. *SAME—By Mortgagor of Mortgaged Premises.*—Where a mortgagor conveys a part of the mortgaged premises, retaining the remainder, as between himself and his grantee, the portion retained by him is to be first applied to the payment of the mortgage.

3. *MARSHALING OF ASSETS—No Injustice to be Done.*—The doctrine of marshaling assets in equity and the rule that that portion of mortgaged premises retained by a grantor shall be first applied to the payment of the mortgage debt, are subject to the qualification that no injustice is done to others.

Memorandum.—In equity. In the Circuit Court of Champaign County; the Hon. EDWARD P. VAIL, Judge, presiding. Bill to foreclose a mortgage; hearing and decree upon master's report; error by complainant. Heard in this court at the May term, 1894. Affirmed in part and reversed in part. Opinion filed November 20, 1894.

CUNNINGHAM & BOGGS, attorneys for plaintiff in error.

JOHN J. REA, attorney for Jacob Y. Wallick, Francis M. Wright, and A. J. Shipley.

J. L. RAY, attorney for Rebecca J. Wallick, defendant in error.

MR. JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

The plaintiff in error by this writ brings before us for review a decree in chancery rendered upon a bill exhibited by him to foreclose a real estate mortgage executed by Jacob Y. Wallick and Rebecca, his wife, to one W. G. McMains, to secure certain notes assigned by McMains to the plaintiff in error.

It appeared from the evidence that Jacob Y. Wallick, in 1885, owned a tract or parcel of land in Sec. 8, T. 19, R. 9, in Champaign Co., Ill., and that on the 18th day of November of that year, he mortgaged to Francis M. Wright as much of the tract as was situated *east* of a line running north and south through the center of said section, to secure certain notes given to Wright. Afterward, on the 3d day of April, 1886, Wallick sold and conveyed an undivided half

of the entire tract to W. G. McMains, who, to secure a portion of the purchase money, gave to Wallick four notes of \$500 each, and executed a mortgage upon such undivided half of the lands to secure them. Wallick assigned these notes and the mortgage to the defendant in error Shepley. On the same 5th day of April, 1846, Wallick and McMains executed a mortgage to Simeon H. Busey, defendant in error, upon all the lands situate *west* of the line running north and south through the center of the section, to secure a note of \$500 executed by them and payable to Busey. On the 7th day of February, 1887, McMains sold and reconveyed his undivided half interest to Jacob Y. Wallick, who secured certain notes given by him to McMains for the unpaid purchase price thereof by a mortgage upon the interest so purchased. These notes McMains assigned, before their maturity, to Clark, the plaintiff in error, who instituted this, a proceeding in chancery, to foreclose the mortgage, which resulted in the decree now sought to be reversed. After the execution of these instruments Wallick conveyed an undivided half of the entire premises to his wife, Rebecca J. Wallick, who subsequently reconveyed to him, upon the execution by him of notes payable to her in the sum of \$2,000, to secure which he executed a mortgage upon an undivided one-half of the entire premises. Wright and Mrs. Wallick entered into an agreement affecting the priority of heir claims which does not demand attention. It is first urged that the description of the premises in the mortgage given by McMains to Wallick, now owned by the defendant in error Shepley, is so defective and insufficient that its record did not operate to charge the plaintiff in error, Clark, with notice thereof. The Circuit Court held that the description in the mortgage, aided by that in a certain deed referred to in the mortgage for greater certainty of description, sufficiently described the premises to put plaintiff in error upon inquiry and to charge him with notice. We are inclined to agree with this holding. The decree of the Circuit Court awarded foreclosure of all the mortgages, directed sale of the premises and distribution of the proceeds by the master. The principal ground of complaint questions the correctness

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of the distribution ordered to be made of the proceeds. The decree declared that the mortgage liens of Clark and Shepley attached upon one and the same undivided half of the premises, and the mortgage lien of Mrs. Wallick upon the other undivided half, and ordered that the premises described in the mortgage to Wright and those described in the mortgage to Busey should be sold separately. No valid ground of objection is perceived in the decree in respect of these matters.

The decree ordered the master to apply the proceeds of sale of the lands described in the mortgage to Wright to the discharge of the debts to Wright. This operated to make each undivided interest in such lands contribute ratably to the payment of the indebtedness to Wright. In this we think error occurred.

The mortgage to Wright was executed by Jacob Y. Wallick when he was sole owner of all the lands described therein. Afterward he sold an undivided one-half interest to McMains and retained the other undivided half thereof.

Where a mortgagor conveys a part or moiety of the mortgaged premises, retaining the other moiety as between himself and his grantee, that portion retained by the mortgagor is to be first applied to the payment of the mortgage. The rule rests upon the plain and just ground that the grantor's own property should be first applied to his own debt. *Oglehart v. Wessner*, 42 Ill. 261; *Moore v. Chandler et al.*, 59 Ill. 466; 14 Am. and Eng. Ency. of Law, 701-7-11.

McMain became vested with title to the one-half interest of the lands mortgaged to Wright protected by this equitable rule.

The enforcement of the rule required that the undivided half retained by Wallick should be first applied to the payment of the mortgage debt to Wright, leaving the interest owned by McMains only secondarily liable thereto, and free therefrom to the extent that the proceeds of the sale of the interest retained by Wallick should avail to pay the debt due to Wright.

The title of McMains so protected by this equitable doctrine would pass with all the beneficial effect of the doctrine to any grantee or mortgagee of McMains. It so passed to Wallick in aid of the indebtedness secured by the mortgage that McMains executed to him. Its enforcement was important to McMains for the reason that, in the event of his failure to pay his notes given to Wallick, it would operate to secure the application of the interest in the land retained by Wallick to the payment of the Wright debt before any portion of the interest applicable to the payment of his notes could be taken in discharge of the debt to Wright. When Wallick assigned to Shepley the notes and mortgage given him by McMains, Shepley, as well as McMains, became interested in the enforcement of the doctrine of equity, and both had the right to demand its enforcement. McMains sold and re-conveyed his interest to Jacob Y. Wallick, who, to secure an unpaid portion of the purchase money, executed his notes, and to secure them, executed to McMains a mortgage on the property for the purchase price, for which the notes were given.

The beneficial effects of the doctrine or rule of equity referred to attached to the lien created by this mortgage in aid of the notes intended to be secured, and the plaintiff in error, to whom McMains assigned those notes, became invested by the assignment with all the rights of his assignor therein.

Therefore the decree should have ordered the master to divide the sum realized by the sale of premises mortgaged to Wright into two equal parts or funds, one of which should have been declared to be primarily and the other secondarily applicable to the payment of the amount of the indebtedness under the mortgage to Wright, and the decree should have directed the master to apply the primary part, or so much thereof as was necessary, to the payment of that indebtedness, and if such part proved insufficient to fully discharge such indebtedness, then the decree should have directed the master to appropriate the other part of such proceeds, as far as necessary, to the full discharge of the

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Wright debt. But such part of the proceeds as was only secondarily liable should have been required to contribute to the payment of the Wright debt only in the event and to the extent that the primary fund was proved insufficient to satisfy it.

The secondary fund, or as much of it as was not so needed to complete the payment of the debt secured to Wright, should have been ordered paid upon the indebtedness secured by the mortgages held by Shepley and by the plaintiff in error according to the priorities of these liens. The decree should, of course, control the fund applicable to the payment of the notes given to Wright, and direct it to be applied by the master in accordance with the agreement between Wright and Mrs. Wallick, as established and declared by the decree.

No valid objection is perceived to the decree so far as it directs the application of the fund arising from the sale of the lands mortgaged to Busey. This mortgage was executed by Wallick and McMains when each of them owned an undivided one-half of the premises described in the mortgage.

Hence, each undivided half was equally bound and should contribute ratably to the payment of the debt to Busey.

The doctrine of marshaling assets in equity and the rule that the portion of mortgaged premises retained by a grantor shall be first applied to the payment of the mortgage debt, are subject, as is suggested by counsel, to the qualification that no injustice is done to others.

No injustice is here done to Wright, who is directed to be paid in full at all events, nor to Jacob Y. or Rebecca Wallick, for they were parties to the mortgage given to Wright, and to the subsequent conveyance of a portion of the mortgaged premises to McMains, and neither have just cause to object to the operation of the rule of equity in question. Indeed, the equities of the cause demand its enforcement as to them. No other persons are injuriously affected.

The decree, in so far as it directs the application of the proceeds arising from the sale of the lands described in the

mortgage given to Wright, is reversed and the cause remanded, with directions to the Circuit Court to enter a decree ordering the master to apply such proceeds in accordance with the rule announced in this opinion. Otherwise the decree is affirmed.

Affirmed in part and reversed and remanded in part with directions.

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John M. Stringam v. Amanda J. Parker.

1. *VENUE*—*Change of, to a County out of the Circuit.*—Under the statute providing that when a change of venue in a suit is granted, it may be to some other court of record of competent jurisdiction in the same county, or to some other convenient county to which there is no valid objection, it is not error to send it out of the circuit.

2. *CONTINUANCE*—*When the Evidence set out in the Affidavit is Immaterial.*—It is not error to refuse a continuance upon the ground of the absence of witnesses, when the facts to be proved by them, as set out in the affidavit, are immaterial.

Memorandum.—Action under the dramshop act. In the Circuit Court of Brown County, on change of venue from Scott County; the Hon. JEFFERSON ORR, Judge, presiding. Declaration in case; plea of not guilty; trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1894, and affirmed. Opinion filed November 20, 1894.

OSCAR A. DeLEUW and F. D. McAVOY, attorneys for appellant.

EDWARD YATES and W. H. CROW, attorneys for appellee.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

Appellee brought this action in Scott county upon a dramshop bond, against appellant, the principal, and W. C. Wright, J. E. Arundel and John R. Bagby, the sureties thereon, claiming injury to her means of support by the

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death of her husband, alleged to have been caused by intoxication from liquor sold to him by appellant. The venue was changed to Brown county, where it was tried. In the course of the trial, plaintiff, over objection by defendant Stringam, dismissed her suit as to the sureties and filed an amended declaration, in case, against him for the same cause of action. She obtained a verdict for \$2,000 damages, which the court refused to set aside and rendered judgment thereon, and he prosecutes this appeal therefrom.

The proof is that appellee, with her husband, resided at the time of his death and for many years previously, at Griggs-ville, in Pike county. He had carried on the drug business until the last year, when he engaged in selling agricultural implements and dealing in real estate. He had accumulated some property, and provided for his family—his wife and one child, a boy about eleven years of age—a good living. At half past one o'clock in the afternoon of January 18, 1892, he left his home in a sleigh with an old and gentle horse, for Naples, somewhat under the influence of liquor. A little after four o'clock he went into the saloon of appellant, which he carried on by his agents, at Naples, slightly but noticeably intoxicated, remained there from a half to three-quarters of an hour, during which he took three drinks at the bar and purchased a two-gallon jug of whisky. When he left, about five o'clock, he was plainly drunk. The weather was very cold, with snow and high wind. Some time in the night or following morning his horse, hitched to the sleigh, came to the house of a witness who recognized it as Parker's, and cared for it. After breakfast he hitched it again to the sleigh and started to find him. Retracing the tracks he found his body lying beside a tree some three miles south of Naples, frozen and dead. Appearances in the snow clearly indicated that, having gotten out of the traveled road into the ditch at its side, the sleigh struck a stump, and Parker, with his jug and lap-robe, had been pitched out; that having picked up the jug he wandered back and forth several hundred yards, deposited it on the stump of a tree and went on to where his body was found, laid down with his overcoat

under his head and was frozen to death. That this was attributable to his intoxicated condition as the proximate cause is beyond any reasonable doubt, and that the liquor he purchased and drank at appellant's saloon largely contributed to produce that condition, is no less apparent from the evidence. Upon these questions there is no conflict in it.

Appellant resided at Jacksonville, in Morgan county, and he and Wright were served with process in that county. Arundel and Bagby, the two other sureties, resided at Bluffs, in Scott county, and were there served. But all appeared and pleaded to the action brought. At the first term of the court in Scott county, appellant, with the concurrence of his co-defendants, filed a petition for a change of venue on the ground of prejudice of the presiding judge, who thereupon made an order sending the cause for trial to Brown county, almost adjoining Scott, but out of the circuit; to which exception was taken. At the term in Brown county next following, the defendants, limiting their appearance to that purpose, entered their motion to remand it to Scott, which the court denied, and to that ruling also exception was duly taken. A trial followed, resulting in a failure of the jury to agree upon a verdict and a consequent continuance to the next term. At that term a motion of defendants for a further continuance, founded on affidavits of appellant and one of his attorneys, was overruled, and the cause was then again tried, with the result now under review.

Error is assigned upon the overruling of these motions and the action of the court in the matter of instructions.

It is said that the Circuit Court of Brown County had no jurisdiction to try the cause and should therefore have remanded it to Scott; and that the order changing the venue was void for want of power in the court to send the case out of the circuit.

That it had that power in some cases can not be denied. Under the old judicial organization, by which only one judge was provided for each circuit, the statute required it to be exercised where the application for a change was based upon the allegation of his prejudice against the applicant; and

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now, when based upon that of all the judges of the circuit in which the cause is pending, it might for the same reason be so ordered. In other cases it is left to the judicial discretion of the presiding judge to whom the application is made, to be exercised chiefly with reference to convenience. The provision of the statute is that "when a change of venue is granted it may be to some other court of record of competent jurisdiction in the same county or to some other convenient county, to which there is no valid objection," with a proviso that where the cause was pending in the Circuit or Superior Court of Cook County, for each of which there was more than one judge, if the ground of the application was the prejudice of the one then presiding, it might be sent to one of the other judges of the same court to whom the objection did not apply. But that is not mandatory and we know of no limitation to the discretion of the judge, except those above stated, viz., that it must be sent to some other court of record of competent jurisdiction, and of the same or some other and convenient county. *Lowry v. Coster*, 91 Ill. 182. Of necessity he must determine the question of convenience. Since the other circuits have been provided with three judges each, the proviso as to Cook county has been in practice treated as applicable to them also, but is no more mandatory. It is still a question of convenience, which is usually and properly, but not necessarily, determined in favor of the same county. It must still be determined by the presiding judge, in the exercise of judicial discretion. Any abuse of it is error, of which the party thereby prejudiced may rightly complain and have corrected. In this case the record shows that most of the witnesses were residents of Naples, where the wrong, if any, was committed; and that the fact would be so was to be anticipated. This court has not the means of determining that it was not, on the whole, more convenient and less expensive for that or other reasons to have the cause tried in Brown county rather than in Scott or any other in the same circuit. If the Circuit Court of Brown County, which was a court of record, of competent jurisdiction to try such a cause against any party

properly before it, was also reasonably convenient, the presiding judge of the Circuit Court of Scott County had power to send the cause to it for trial, and the refusal to remand it was not error. We see no abuse of discretion in sending it there.

It is to be further observed that appellant, who was the real wrongdoer charged, and principal defendant in the action as originally brought, appeared, pleaded, and made defense to it, and to the amended declaration, and also moved for a continuance and submitted to a trial. His case is therefore quite unlike that of *Herkimer v. Sharp*, cited from 5 Bradw. 620, in which, however, it is said that if the defendant, against whom judgment was taken by default after dismissal of the suit, against the party resident, and served in the county where the action was brought, had pleaded to it, as appellant here did, he would thereby have conceded the jurisdiction and been bound by the judgment.

The affidavits for continuance, whether under the statute or addressed to the discretion of the court, were materially defective. They set forth the absence, by reason of illness, of the defendant and of Mr. DeLeuw, one of his counsel, and of two witnesses in Pike county, for whom subpoenas had been issued and returned not found. The court took notice of the fact that the defendant had been a witness on the former trial and testified only to the directions he had given his agents as to the conduct of the business intrusted to them, which was immaterial. He knew nothing of what occurred at Naples. The counsel who conducted this trial on his behalf had also, in conjunction with Mr. DeLeuw, conducted the former trial, and no reason was shown for supposing that he needed any assistance on this, or that his client was prejudiced by the want of it. The witnesses from Pike county were wanted to prove only that the two gallon jug, when found, was full. The coroner testified that when produced before him it was nearly so. But what if it was entirely full? The evidence was abundant that when Parker left appellant's saloon he was drunk and needed nothing from the jug to make him so. The motion for a continuance was therefore properly overruled.

As to the instructions, the complaints are that the court told the jury that if the material allegations of the declaration were proved by a preponderance of the evidence, without stating what were the material allegations, they should find for the plaintiff. It is true that in the instruction given for plaintiff they were not stated, but in the first given for defendant they were fully and numerically set forth, which cured the alleged defect. *St. L. & K. C. R. R. Co. v. Bailey*, 145 Ill. 159.

The refused instruction asked by defendant was fully given in others.

We are of opinion that the verdict was clearly right upon the evidence, and that no error of the court complained of, if rightly complained of, would warrant a reversal of the judgment. It will therefore be affirmed.

Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. William Davis.

1. *EVIDENCE—Admission of Immaterial Matters, When Error.*—Upon the trial of a suit the admission of matters in evidence, though immaterial and wholly foreign to the issue, but which affords the jury the means of avoiding the task of determining whether the plaintiff has sustained his grounds of action by a preponderance of the evidence, is reversible error.

2. *TRIALS—Improper Conduct of Counsel.*—On the trial of an action for personal injuries, it appeared that a fireman remained upon his engine, although he knew that "the boy's legs were cut off." Counsel for plaintiff said, "You would not have known any more about it if he had got his head cut off, would you?" The court sustained an objection to the remark, and counsel retorted, "It would only be a difference in the offense committed by him." *Held*, improper, but not of itself sufficiently so to demand a reversal of a judgment otherwise unobjectionable.

Memorandum.—Action for personal injuries. In the Circuit Court of Montgomery County; the Hon. ROBERT B. SHIRLEY, Judge, presiding. Declaration in case; plea, not guilty; trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1894. Reversed and remanded. Opinion filed November 30, 1894.

STATEMENT OF THE CASE.

On the 1st day of May, 1893, appellant's servants in charge of its switch engine, were engaged in switching cars in its yards at Litchfield. The engine, attached by the coupling bar at its head or front end to a train of three or four cars, was running backward on the track in the yards, when Willie Davis, a boy of about twelve years of age, a son of the appellee, and Willie Goodpasture and Michael Furlong, also boys of about the same age, got on the foot-board at the rear end of the tender of the engine for the purpose of enjoying a ride. After riding there for a distance of about 400 feet the boys jumped off and Willie Davis was run upon by the wheels of the tender and engine and received such injury to his legs that it became necessary to amputate both of them.

The appellee, his father, claimed that John Hanlon, who was at the time acting as fireman on the engine, threw a lump of coal at the boys, which struck Michael Furlong, and so frightened them that they jumped from the foot-board. This was an action on the case brought by the appellee against the appellant company to recover for the loss of services of his son and for nursing and caring for him, and for expenses incurred while he was suffering from his injuries.

Judgment upon the verdict for the plaintiff below in sum of \$1,000, and the railroad company prosecuted this appeal.

AMOS MILLER and GEO. F. McNULTY, attorneys for appellant.

ZINK & KINDER, attorneys for appellee.

MR. JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

The boys were wrongfully on the foot-board and were trespassers.

To warrant a recovery it was incumbent on the appellee to establish by a preponderance of the evidence the charge in his declaration that the fireman threw a lump of coal at them and caused them to jump off. This was the charge and the only charge in each count of the declaration and it constituted the sole ground of his right of action.

Willie Davis and Michael Furlong testified that the fireman threw the coal, and James Hanlon, the fireman, and John Cook, the engineer at the time, testified as positively that he did not, and that no coal was thrown. All had equal opportunity to know. Goodpasture was not produced as a witness. Each side of the controversy has some corroborating testimony. It was, however, but slight, and so nearly equal in weight that it had only a counterbalancing effect.

Counsel for appellee in their brief say: "We come now to the issue in the case, the fact to be determined, viz., was the coal thrown by the fireman? The testimony on this point is squarely contradictory. It can not be reconciled." It was essential to a just and correct decision of a question so close and difficult of determination that no irrelevant consideration should lead the minds of the jury away from the principal fact in dispute, and induce them to consent to a general verdict, leaving undecided the fact upon which appellee's right to recover solely rested. Nothing should have been admitted in evidence that was not relevant, pertinent and confined to this issue.

The court allowed the appellee, over the objection of the appellant company, to prove that the rules and regulations of the company provided that no one should be allowed to ride upon its engines without written permission from the superintendent or train master, and made it the duty of the engineer and fireman to stop an engine and put off any one who might come upon it without the requisite written permit.

This evidence did not tend to aid the jury to determine whether the fireman threw coal at the boys and thereby caused them to jump off, but was wholly foreign to that issue.

It, however, furnished the basis for an argument that the injury to the boys would not have occurred had the engineer or fireman stopped the engine and made the boys get off, as the rule required, and opened the way for a verdict against the company upon that theory. It afforded

the jury the means of avoiding the difficult task of determining whether the plaintiff had sustained his ground of action by a preponderance of the evidence and made possible a verdict for the plaintiff, though it might have been impossible for the jurors to agree upon the one fact upon which such a verdict could alone rest.

The conflict of evidence was so great, and the right of plaintiff below to recover so uncertain, that we can not but regard the admission of this irrelevant testimony as a serious and just ground for complaint.

The appellant company insists that its cause was unduly prejudiced in another respect.

The fireman, when testifying, stated that he did not go with others to the assistance of the boy after the accident, but remained at his post on the engine, though he "knew that the boy's legs were cut off."

Counsel for appellee at this point said to the witness: "You wouldn't have known any more about it if he had got his head cut off, would you?"

The court sustained an objection to the remark and counsel retorted, "It would only be a difference in the offense committed by him."

The court sustained an objection also to this. Though couched in the form of an interrogatory, the first remark above quoted was not intended to elicit information for the consideration of the jury; the last was not even in the guise of a question, and both appealed to the prejudices of the jury and were likely to arouse passion and prevent that calm and unbiased consideration of the evidence which was so indispensable to a fair and impartial disposition of the case. While we might not regard the conduct of counsel sufficient of itself to demand the reversal of a judgment otherwise unobjectionable, yet the case at bar, for the other reason indicated, and in other features, is so unsatisfactory that altogether we feel impelled to the conclusion that the verdict and judgment ought not to stand, but that the cause should be submitted to another jury for a rehearing.

The judgment is reversed and the cause remanded.

Wesley Woodard v. The People ex rel., etc.

1. **BASTARDY—Form of Judgment.**—The judgment entered in a bastardy proceeding was as follows: "It is therefore considered by the court upon due proof that the complaining witness, Emma A. Hornick, is, and always has been, an unmarried woman, and was delivered of a bastard child on the, and on the finding of the jury that the defendant, Wesley Woodard, is the real father of said child, it is ordered and adjudged by the court that the defendant, Wesley Woodard, pay the sum of \$100 for the first year, from the, and \$50 yearly thereafter." *It was held* that the blank spaces should have been filled with the date of the child's birth.

2. **JUDGMENTS—Clerical Errors—Omissions in Form.**—Where, in entering up a judgment in a bastardy proceeding, the clerk omitted to insert the date of the birth of the child, the Appellate Court remanded the proceedings with directions to the clerk to correct the omission.

Memorandum.—Bastardy. Appeal from the Circuit Court of McLean County; the Hon. C. D. MEYERS, Judge, presiding. Heard in this court at the May term, 1894. Reversed and remanded with directions, etc. Opinion filed November 30, 1894.

A. B. DAVIDSON, attorney for appellant; FIFER & PHILLIPS, of counsel.

JOHN A. FULWILER and ROWELL, NEVILLE & LINDLEY, attorneys for appellees.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

This was a prosecution upon a complaint for bastardy. Defendant appeals from the judgment of the County Court on a verdict against him.

Two points are urged for a reversal—that the verdict was against the evidence, and that the judgment is defective in form and void.

The abstract does not show that any exception was taken to the overruling of his motion for a new trial, nor that error was assigned thereon. Whether the transcript does

or not we have not taken pains to ascertain, because we find evidence enough to support the conclusion of the jury.

Complainant stood alone as a witness on the side of appellees, but testified positively to the only material fact in issue, and with as much particularity as to time, place and antecedents as is usual in such cases. No other could be expected to testify to it if disputed. Defendant denied it as positively.

They agreed, however, that for some time, up to November, 1892, while she was employed as a domestic servant in his father's house, their relations were improper; that she then removed to Chicago, but met him again in April, 1893, when she made a short visit to the family. Her child was born on January 1, 1894. Their difference was as to what occurred during the visit in April. She stated the time she made it as "about the first" of that month, and he that she came on the 22d, in which he was corroborated.

She was also contradicted as to several incidents occurring on different occasions by several of his relatives, respectively, but we do not think these were of sufficient importance to affect her credibility materially, or reasonably required the jury to believe him rather than her in respect to the main fact in question. His own statements respecting himself were not well calculated to commend him to their confidence.

The defect in the judgment is shown by the following extract: "It is therefore considered by the court, upon due proof, that the complaining witness (named) is and always has been an unmarried woman, and was delivered of a bastard child on the ———— and on the finding of the jury that the defendant, Wesley Woodard, is the real father of the child, it is ordered and adjudged by the court that the defendant, Wesley Woodard, pay the sum of \$100 for the first year from the ———— and \$50 yearly thereafter," etc.

These blank spaces should have been filled with the date of the child's birth. R. S., Ch. 17, Sec. 8. That date was fixed by evidence in the record and undisputed. It is clear that when writing up the judgment the clerk knew that

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some date was to be inserted and left the blanks therefor, but was uncertain either as to the evidence or the statute, and intended, after ascertaining the proper date, to insert it, but forgot or neglected to do it. The omission was a purely clerical error, for which the cause may properly be remanded with directions to the County Court to have each of the blanks filled by inserting "first day of January, A. D. 1894," and it will be so ordered. *Moore v. The People*, 13 App. 248; *White v. The People*, 81 Ill. p. 237.

The costs of this court will be taxed against the appellant. Reversed and remanded with directions.

Abraham D. Skinner and Joseph T. Grimes v. Peter Mulligan.

1. **MEASURE OF DAMAGES—*Under Special Counts***—Under a special count for a breach of warranty of goods sold, the measure of damages is the difference between the value of the goods as warranted, and their value with the defects shown.

2. **SAME—*Sale Rescinded***.—A vendee of goods can recover the contract price paid, only by showing that the contract of sale has been rescinded, and upon the promise, in such case implied, to return the price as money had and received by the defendant for his use.

3. **CONTRACTS—*Implied and Expressed***.—The law never implies a promise where one expressed, which in terms governs the case, is still subsisting and enforceable.

4. **SALES—*Rescission and Breach of Warranty***.—A warranty is not a part of a contract of sale, except as a part of the consideration received for the price paid. The vendee's remedy upon a sale is on the warranty, without which he has none, and his right of recovery is limited to the amount of depreciation due to the breach. He can not lawfully compel the vendor to take back the property and return the price paid.

Memorandum.—*Assumpsit*. In the Circuit Court of Champaign County; the Hon. FRANCIS M. WRIGHT, Judge, presiding. Trial by jury; verdict and judgment for plaintiff; appeal by defendants. Heard in this court at the May term, 1894. Reversed and remanded. Opinion filed November 30, 1894.

W. A. PERKINS, attorney for appellants.

JOHN J. REA, attorney for appellee.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

In September, 1892, appellee, a farmer residing two and a half miles from Tolono, bought of appellants, who were partners, dealing in farming implements at that place, a new buggy which they warranted for one year, to be made of good material, in a workmanlike manner and well painted, and agreed to make good any defects in either particular during that time. Before purchasing he examined it with full opportunity, and upon his promise to pay \$80 for it in thirty days if it should prove satisfactory, was allowed to take it away. At the end of that time he told them it was all right, and paid for it as he had agreed. After using it through fall, winter and spring, nine and a half months, without complaint, he brought it to their place of business in June and told them "it wasn't filling the warranty" because the paint was coming off in places and the tires were somewhat loose, and wanted them to "take it back" meaning thereby, as appears from his testimony, that they should keep the buggy and return the price he had paid for it. This they declined to do, but offered to repair the defects and make it satisfactory by soaking the wheels in linseed oil and painting it up. Upon his refusing that offer they proposed to replace the buggy with another which they showed him, but he refused that also because it was a jobber's buggy and priced at \$75, though the one he had was a jobber's buggy and appellants claim that the difference in price was no more than a fair offset for his use of it. He intended to leave it there at that time, but they then had no room for it and desired to learn what the jobbers at Peoria, of whom they purchased, would do about it, and therefore he consented to keep and use it a while longer. So the matter stood until some time in July, when he drove up in front of a blacksmith shop just opposite their warehouse, and unhitched. Leaving it there he crossed over and saw Grimes, who said, "We are ready to accept that buggy, we will take it back now," to which he

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replied, "All right, that's it across the street there." He was going to pull it across, but Grimes said, "Never mind, we haven't room here now; as soon as we clear away we will take it in;" and that was the last he saw of it. Such is appellee's version, but Grimes denied that he said they would "accept" or "take back" the buggy, though he admits that on the next morning he put it under their shed. And appellee admits that Grimes then also said they would give him another buggy; that they had just received an \$85 one which was in a crate; that he said to Grimes, "Put that one back there and I will come down in a day or so and look at it;" but Grimes objected and offered him still another \$75 one, which he refused; that Skinner, who had made the sale to him, was then absent, but expected to be back on the following Monday, and that Grimes having said in the further conversation about the one in the crate that he "didn't want to interfere between him and Skinner on this deal," he replied that he would come down and see him; that he did come down and have a talk with him, the result of which he stated as follows: "He pulled right off and said they wouldn't do no such thing, but they would send the buggy off and have new wheels put on it and have it painted up, and I could take that or do as I pleased."

Within a day or two thereafter he brought this suit, declaring in two special counts on the warranty and the common counts; to which the defendants pleaded the general issue. A verdict was returned for the plaintiff for \$80, on which judgment was rendered.

Under the special counts he could rightfully recover only the actual damages caused by the breach, the measure of which would be the difference between the value of the buggy as warranted and its value with the defects shown. There was no attempt to show the amount of this difference. Plaintiff contented himself with proof of the warranty, breach and return of the property. According to his own statement the buggy was all right except as to chipping off of the paint and the loosening of the tires. The paint was chipping off only on the axle, running gear and shafts, and

only in spots here and there, probably a quarter of an inch square. This did not occur until late in the spring, and no shrinkage of the wheels was observed before the weather became warm. If this condition was wholly due to defect of material or workmanship, which was contested upon strong and uncontradicted evidence, the damage could not have been properly presumed or inferred to be equal to the price. Hence, if the assessment was made under the special counts or either of them, it should have been set aside on the motion for a new trial, as being unsupported by the evidence.

But it seems clear from the evidence and the argument that plaintiff was not seeking damages for the alleged breach of the warranty, but the price he had paid. This he could recover only by showing that the contract of sale had been rescinded, and upon the promise, in such case implied, to return the price, as money had and received by the defendants for his use. The recovery here must be sustained, if at all, under the common count on such implied promise.

But the law never implies a promise where one expressed, which in terms governs the case, is still subsisting and enforceable. The question, then, is whether the contract of sale had been rescinded.

If so, it must have been either with the consent of appellants or for reasons which the law allows as sufficient without it.

The evidence bearing upon the question of their consent is fully set forth in the foregoing statement. That is a question of intention, and we are clear that this evidence not only fails to show that they ever so intended, but does show affirmatively that they did not. Conceding that Grimes said they were ready to accept the buggy, to take it back now, it is evident he did not mean that they would consent to a rescission of the sale and return the price they had received; for according to the testimony of appellee himself he added that they would give him another, which he immediately pointed out. And upon appellee's proposing to take a different one he objected, and the matter was left to

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be settled between appellee and Skinner, who failed to agree on any terms of settlement. Skinner's *ultimatum* was to repair the buggy in the manner indicated, and there was never a word about rescinding the sale, returning the price, or taking the buggy back absolutely.

Could appellee rescind it without their consent? The sale was of a specific chattel, and the warranty related not to title but quality only. On the part of the vendors the contract was to deliver the chattel and give the warranty; on that of the vendee, to pay in consideration thereof the sum of \$80. They did deliver it and give the warranty and he paid the price agreed on. Thereby the title passed and the contract was fully executed. Appellee received for his money paid, all that by the terms of the contract he was to receive. Thus there was no breach of that contract on the part of the appellants. Nor is it charged that any fraud was practiced by them in connection with it; nor complained that on the part of appellee there was any misunderstanding of its terms or mistake as to the subject of it. Upon what principle, then, could he rescind it without their consent? The claim is that it was broken by them, and for that reason, upon returning the subject of his purchase he could reclaim the price. But what was broken, if anything, was the warranty, which was not a part of the contract of sale except as a part of the consideration he received for the money he paid. He knew it might turn out to be broken and for that reason only he took it, as a means and ground of recovery for whatever damage he should sustain from any defect specified in it. Without it he would have had none, and with it he had no other. His remedy was upon the warranty alone and his right of recovery was limited to the amount of depreciation due to the breach. He could not lawfully compel appellants to take back the buggy and return the price paid. There was, therefore, no such cause of action shown as was alleged in the common count. *Crabtree v. Kile*, 21 Ill. 180; *Doane v. Dunham*, 65 Id. 512; *Owens v. Sturges*, 67 Id. 366; *Kemp v. Freeman*, 42 App. 500; *Addison*, Cont., Sec. 632.

The cases relied on for appellee, in which, though the contract has been executed the vendee is allowed to rescind it, return the property and recover the price as money had and received to his use, are within the exceptions recognized by those above cited. These include those in which the vendor has acted fraudulently, or the defects in quality warranted against, are such as to defeat entirely the known object of the purchase. Thus in *Sparling v. Marks*, 86 Ill. 125, the vendor sold what he knew was a worthless crystal, but warranted to be a diamond, a gross, actual fraud; and in *Hanson v. Busse*, 45 Id. 499, which was a suit against the vendee for the price, the contract was for apples sold in barrels by sound samples and warranted to be as good, but found to be unmerchantable and worthless from decay, and immediately returned. Moreover, in that case the contract was executory.

The court instructed the jury that if they found there was a warranty and breach as alleged, they should assess the plaintiff's damages "at whatever you may, from the evidence, determine that he has sustained, if any," without giving, as it should, a proper rule for measuring them; and refused the following, asked by defendants:

"Unless the jury shall believe from the evidence that the defendants fraudulently and deceitfully sold the plaintiff the buggy in question, or agreed that the plaintiff could return the buggy, then the plaintiff could not return the buggy, but must keep it," which should have been given.

We think the jury were left to understand, and must have understood, the law to be that in case of any breach of the warranty he could return the property and rescind the sale without the consent of defendants, or the fact to be that they did consent, and so concluded in either case that as they had the buggy, he ought to have the money he had paid for it. But the law and the fact were otherwise.

For these errors and the refusal to set aside the verdict as being against the law and the evidence, the judgment will be reversed and the cause remanded.

**Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v.
Margaret McLaughlin, Administratrix of the
Estate of James McLaughlin.**

1. **NEGLIGENCE**—*Signals at Railroad Crossings.*—In order to convict a railroad company of negligence in not maintaining a signal at a crossing of another railroad, it must be shown that the signal was necessary.

2. **INSTRUCTIONS**—*Must be Confined to the Negligence Charged.*—An instruction upon the question of negligence must be confined to the scope of the negligence alleged in the declaration.

Memorandum.—Action for damages. Death from negligent act. In the Circuit Court of Edgar County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Declaration in case; plea, not guilty; trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1894. Reversed and remanded. Opinion filed November 30, 1894.

R. L. MCKINLAY and C. S. CONGER, attorneys for appellant.

F. W. DUNDAS and H. S. TANNER, attorneys for appellee.

MR. PRESIDING JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

It appears from the evidence that the deceased, James McLaughlin, was employed by appellant company in the capacity of road supervisor, and while so employed, that he was riding on an engine which collided with the caboose of a freight train of the I. & I. S. R. R. Co., at the crossing of the two railroads, whereby the engine was thrown from the track, and said McLaughlin was killed.

The declaration alleged in the first and second counts that the collision was through the fault and negligence of the engineer, who, as was alleged, was not a co-employee with the deceased. In the fifth count it was alleged that the defendant had negligently failed to place a signal at the crossing and that for the want of such signal the engineer was not able to determine the location of the crossing and

by reason of such negligence the collision occurred. The other counts in the declaration were abandoned. The plaintiff recovered a verdict and judgment thereon for \$5,000. The accident occurred at night and when it was very dark. There was no signal at the crossing, which was within the corporate limits of the city of Robinson.

From the proof it appears that there were twenty-five or thirty houses clustered about the crossing and south of it, in which there were lights which could have been seen by the engineer for at least a half mile south of the crossing. The engineer whistled at about the proper place south of the crossing, but did not come to a stop.

The lights in these houses should, and probably did, give him sufficient notice of the locality, and, if so, then it was through his mere negligence that the collision occurred.

There is no proof that a signal was necessary and that the company was negligent in not having provided one. On the contrary the circumstances tend to show that it was unnecessary, and hence there was no negligence in the omission. The defendant offered no testimony, and the case went to the jury on the testimony offered by the plaintiff.

There was nothing upon which to predicate a recovery under the fifth count and it was error to give the first instruction asked by the plaintiff, which assumed that there was evidence "that the defendant had neglected to provide all reasonable and proper precautions to prevent accidents in the crossing of said other railroad," * * * "and that the death of the deceased was caused by the neglect of defendant to provide such precautions."

The instruction was faulty in not confining the scope of negligence to that alleged, to wit, failing to provide a signal, but the radical objection to it is that there was not sufficient evidence upon which to base it.

This error is the more serious because the only other ground of recovery claimed by the plaintiff was that the negligence of the engineer was not that of a fellow-servant.

Whether the deceased and the engineer were fellow-servants is, to say the least, a very close question, which the

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jury might have preferred to pass over if recovery could be based upon the failure to provide signals, as was alleged in the fifth count.

It can not be known upon which ground they found their verdict, and if, as above indicated, there was no foundation for a recovery under that count, it was highly prejudicial to the defendant to give said instruction.

In this view of the case we are not disposed to discuss the question of fellow-servants, but we leave it open for the unbiased consideration of the jury if there shall be another trial.

The third instruction is criticised by the appellant as not properly stating the rule by which the question is to be settled.

We are inclined to think it is so drawn as to place before the jury as a chief test that the deceased and the engineer were employed in different departments of labor and were wholly separated and disconnected in the performance of their duties, that is to say, that their duties were wholly separate and distinct. This might be true and yet, in performing their separate and distinct functions, they might have been so habitually thrown together or consociated as to exercise an influence upon each other promotive of proper caution. While the instruction as drawn may be correct in a general sense, yet it is so framed as to be somewhat misleading, and apparently in conflict with those given upon the same point at the instance of the defendant. For the error indicated the judgment will be reversed and the cause remanded.

**Francis M. Bayless, Adm., etc., of Martha A. Baker, v.
The People, etc., for the use of T. J. Dick.**

1. **SALE OF REAL ESTATE TO PAY DEBTS—*Mortgage Liens to be First Paid.***—An administrator of an estate sold real estate incumbered by mortgage to pay debts; the order of distribution directed him to discharge the mortgage lien first out of the moneys received from the sale.

He paid a portion of said moneys upon the mortgage indebtedness and applied the balance to the costs of administration and to his commissions, all of which he reported to the court, and which being approved, he was discharged. Afterward, in a suit upon his official bond, it was held that the order discharging him was inoperative as against the mortgage creditor.

2. EXECUTORS AND ADMINISTRATORS—*Demand Under Sec. 115, Ch. 3, R. S.*—The demand of an executor or administrator provided for in Section 115 of Chapter 3, R. S., entitled "Administration of Estates," is required only in cases where it is proposed to proceed against the executor or administrator by attachment of his person.

3. COSTS.—*Not to be Adjudged Against Mortgagee, etc.*—In a proceeding by an executor or administrator to sell real estate incumbered by mortgages as prior liens, and where the mortgagees are made parties merely for the purpose of ascertaining the amount due them, the court will not require the costs of the proceeding to be paid out of the proceeds of the sale before paying the amount of the mortgage indebtedness.

Memorandum.—Suit on an administrator's bond. In the Circuit Court of DeWitt County; the Hon. GEORGE W. HERDMAN, Judge, presiding. Declaration in debt; pleas, *non est factum* and *plene administravit*. Trial by the court without a jury: finding and judgment for plaintiff; appeal by defendants. Heard in this court at the May term, 1894, and affirmed. Opinion filed November 30, 1894.

APPELLANT'S BRIEF, R. A. LEMON, ATTORNEY.

Appellant contended that the order of the County Court approving of the administrator's final report embracing the items in question in this case, showing nothing due to the plaintiff, constituted an adjudication in respect thereto, and was binding upon the creditors of the estate until reversed or set aside. Short et al. v. Johnson, administrator, 25 Ill. 405; Bucher et al. v. Bucher, 86 Ill. 377; Dickson et al. v. Hitt, 98 Ill. 300; Housh v. The People, etc., 66 Ill. 178; Frank et al. v. The People, etc., 147 Ill. 105.

The County Court in the settlement of estates is not a court of inferior jurisdiction, but has a general jurisdiction, and as liberal intendments will be indulged in its favor as in the case of proceedings in the Circuit Court. Moffit et al. v. Moffit, 69 Ill. 641; Eckley et al. v. Clark et al., 24 Ill. App. 495; Frank et al. v. The People, 147 Ill. 105.

APPELLEE'S BRIEF, WILLIAM MONSON, ATTORNEY.

Appellee contended that the rule laid down by the author-

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ities cited by appellant, only applies where all debts of the estate have been paid, or the funds of the estate disbursed in payment of debts, according to their classification and the requirements of the law; and if one of the creditors has been ignored by the administrator and not paid in full his *pro rata* share, such approval and discharge is void as to him. *Diversey, Admr., etc., v. Johnson, Admr.*, 93 Ill. 547; *Blanchard v. Williamson*, 70 Ill. 647.

The proceeds of the sale of this real estate to the extent of the mortgage indebtedness never became assets in the hands of the administrator for payment of the debts of the estate; and until it was fully paid he had no money belonging to the estate to pay on other claims or expenses of administration. It was the money of appellee, and it having come into his hands under the law and the decree of the County Court, as administrator, he is liable on his official bond for a misapplication of the funds. *Furness et al., Adm., v. Union National Bank*, 147 Ill. 570.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

Appellant, having exhausted the personal estate of deceased in payment of debts, petitioned the County Court for leave to sell two town lots to pay the deficiency, shown to be \$243.32. T. J. Dick and John M. Jones, holding a mortgage upon said lots for \$150, with interest, were made parties and answered, setting up their mortgage and claim. Upon a hearing the court made a decree granting the leave asked, finding the mortgage a prior lien and the amount due thereon to be \$178, and ordering appellant, as administrator, to pay out of the proceeds of the sale, first, the said mortgage indebtedness with interest thereon at six per cent from that date, then certain taxes on the lots, and bring the residue into court, to be distributed as thereafter to be ordered. It directed that the lots be sold disincumbered of the mortgage and the title vested in the purchaser, and that the administrator report his proceedings in the premises. He sold the lots for \$255, all of which he received, and so reported. Afterward on April 6, 1892, he made his final report, showing that he had paid Dick, who in the

meantime had acquired the interest of Jones in the mortgage, the sum of \$100, and applied the residue of the proceeds to the payment of costs of the administration, including the sale of the lots, and his commissions, leaving no balance in his hands, on which the court entered an order approving the report and discharging the administrator.

This was an action of debt on his official bond, on which Dick, for whose use it was brought, was the sole surety, and the breach of its condition assigned was his failure to pay out of the proceeds of the sale of the mortgaged premises the residue of the mortgage debt, in obedience to the explicit order of the court. Defendant pleaded *non est factum* and a special plea setting up the proceedings in the County Court, closing with the order for his discharge. A demurrer to the latter was sustained, and defendant abiding, the parties by consent went to trial before the court without a jury under the general issue; on which the finding was for plaintiff and judgment rendered thereon in debt for the penalty of the bond to be discharged on payment of \$90, the damages assessed, and costs.

It is insisted that the special plea presented a good defense; that the order "approving the final report, embracing the items in question in this case, showing nothing due to the plaintiff, was an adjudication in respect thereto and binding upon the creditors of the estate until reversed or set aside."

The item here in question is the balance of the mortgage debt remaining after the payment of \$100. It was not embraced in the final report, which does not show nothing due to the mortgage creditor, but does show, in connection with the petition for former order authorizing the sale, and his report of the sale, that although he had in his hands as administrator, of the proceeds of such sale, moneys more than sufficient to pay it as he was ordered, this balance remained unpaid. The order discharging him was therefore inoperative as against such creditor. *Blanchard v. Williamson*, 70 Ill. 647; *Diversey, Admx., v. Johnson, Admx.*, 93 Id. 547.

The claim, on the evidence, that the mortgage creditor and the administrator were represented on the final settlement by the same counsel, we think is not sustained.

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It is said this action could not be maintained until an order was procured from the County Court directing the payment to be made, and demand therefor thirty days before its institution, referring to Starr & Curt. Statutes, p. 224, Sec. 115. We are of opinion, notwithstanding the unnecessary remark in Frank v. The People, etc., 147 Ill. 105, that this demand is required only with a view to proceeding against the administrator by attachment of his person. The statute declares that the failure to pay over as ordered shall be deemed and taken to amount to a *devastavit*, for which "an action on the bond may be forthwith instituted, and it may be brought and maintained against the sureties, though the administrator may not be found. There may be, for divers reasons, no possibility of making a demand of him, but the remedy by this action would not therefore be defeated." In the case cited the question was when the cause of action on the bond accrued, and it was held to be when the order to pay was made. The court in another place said: "The right of action upon the bond accrued, under the statute, upon failure of the administrator to pay the money to the distributees in accordance with the order and judgment of that court;" and the judgment was affirmed, though it does not appear that any demand was made.

It is urged for equitable consideration that the proceeds of this sale were applied to no other claims than that of the mortgage creditor except costs; that this proceeding included substantially a foreclosure of the mortgage; that the creditor could not expect to have his mortgage foreclosed without having the costs paid out of the proceeds of the sale of the mortgaged premises, and that the court has the power to dispose of the question of costs according to equity, and having approved of their payment as made in this case, it is as if it had so ordered in advance; in which case the payment could not be deemed a *devastavit*. And reference is made to what is said to be the practice upon the filing by masters of their report of payments under orders of distribution. This would have more force as against legatees, devisees or distributees, if there were any such or any sur-

plus in this case, than as against creditors. It was not in fact a proceeding by the mortgage holder to foreclose it. He did not come into the court of his own motion for any purpose. He was brought in to show his claim, which was found to be a specific and first lien upon the premises the administrator sought leave to sell. There was no dispute about its amount or character. The property was more than sufficient to pay it. The order of the court was to pay it in full, with interest, without diminution or deduction, and pay on other accounts only the surplus remaining thereafter. The other claims, which the administrator, in disregard of that order, diminished it to pay, were not confined to the costs of the proceedings for the sale, but included taxes, which were not to be paid until the mortgage debt was paid in full, court costs, aside from those incurred in connection with the sale, attorney's fees, and his own commissions and expenses—commissions presumably on the diminished amount he paid the mortgage creditor. His payment of them out of moneys in his hands of right and by adjudication belonging to the creditor, and consequent failure to pay him, in disobedience of the express order of the court, was a wrong done by him to such creditor, which the court could not legally or equitably make right by a subsequent order, merely approving his report of it. The better practice in chancery, upon the coming in of masters' reports of distribution, is to approve only conditionally, by an order *nisi*, except where the parties interested, by their solicitors then present, consent to have it made absolute.

The judgment of the Circuit Court, appearing to be legal and just, will be affirmed.

City of Pana v. Mary J. Taylor.

1. MUNICIPAL CORPORATIONS—*Duty to Keep Sidewalks in Repair.*—It is the duty of municipal corporations to use reasonable care and diligence to keep its sidewalks in a reasonably safe condition, and if a person suffers an injury by reason of neglect of such duty, while in the exercise of reasonable care and caution, the corporation is liable.

City of Pana v. Taylor.

Memorandum.—Action for personal injuries. In the Circuit Court of Christian County; the Hon. JACOB FOUKE, Judge, presiding. Declaration in case; plea of the general issue; trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1894, and affirmed. Opinion filed October 29, 1894.

E. A. HUMPHRIES, JR., J. E. HOGAN and PALMER, SHUTT & DRENNAN, attorneys for appellant.

J. C. McQUIGG and J. C. McBRIDE, attorneys for appellee

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

The judgment below was for \$450, upon a verdict for damages sustained by appellee from a fall caused by an alleged defect in Jefferson street of the city. This defect was a hole "of the depth of, to wit, ten inches, and of the width of, to wit, sixteen inches, * * * in and upon said street, and near a pathway used for travel by foot-passengers;" and the negligence charged was in suffering and permitting it to be and remain there, with notice of such defect, for six months prior to and until the occurrence of the injury complained of, and without sufficient light by which to see it at night.

Though the trial was upon the general issue, it was not denied that on the 30th of April, 1893, and for six months continuously prior thereto, there was substantially such a hole, located as alleged; that between nine and ten o'clock of that night, which was then misting and very dark, appellee, on her return from a religious meeting to her home by the usual route, stepped into it and thereby fell, sustaining damages to the amount found; and that there was then no artificial light sufficient to enable her to see it. These facts were fully proven.

It further appears that this hole, left like others by the removal of an electric light pole, was on the north side of Jefferson street, which ran east and west, and some two hundred feet or more east of Cedar street, which was the first cross-street west. At one of the corners was the nearest

street light, which was too feeble to show the defect in question—between two and three hundred feet distant—even in a fair starlight night. The main business part of the city, and the hall in which the religious meeting referred to was held, were west of Cedar street, but there were many residences east of it. Jefferson street had been opened and used for twenty years. It was graded in the usual manner, with slight ditches or gutters about six feet from the street lines, leaving the space between them for sidewalks, over which from one hundred and fifty to two hundred and fifty persons passed daily, and by night as well as by day. On the south side, from Cedar street east along the first four lots, was a plank sidewalk, but no further. There was none on the north side; but the space between the gutter and the north line of the street was level, and a strip in the middle, two or three feet wide, was well beaten by travel. The hole in question extended from the gutter some five or six inches into the elevated space north of it, and had been partially filled, but was still ten or twelve inches in depth, and almost directly opposite the east end of the plank walk on the south side. Pedestrians going east on Jefferson from Cedar generally took the plank walk as far as it went and then crossed over to the north side in a dry time by a path angling eastward, but when it was wet by the shortest line, directly across, to lessen the distance through the mud. The hole was between the northern *termini* of these paths.

Appellee's residence was east of this point. On the evening in question, after she had gone to the meeting with her husband and daughters, it came on to rain, and when they returned it was misting heavily and very dark. They returned by the way of Cedar and Jefferson streets, which was the usual route, taking the plank walk on the latter to its east end and there crossing separately and by somewhat different lines to the north side. Mud and darkness made undistinguishable whatever path or paths there had been. Appellee crossed last.

She was fifty-six years of age and was well acquainted with the locality, having passed and re-passed it very fre-

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quently during a residence of about two years in the neighborhood. She had often seen this hole during six or eight months and knew about where it was with reference to these crossing paths. But on this occasion she did not and could not see it. She did not know and could not see whether she crossed directly or not. She was in the mud, and according to her statement, aimed to get out of it and across the street "the best she could" with nothing by which to see except an occasional flash of lightning. Having reached the north sidewalk she turned east and almost immediately stepped upon the edge of the hole with her right foot, which unavoidably slipped in and went to the bottom. She fell with her weight upon her right arm, breaking her wrist and doing other injury which caused great pain and permanent disability.

Of the errors assigned two only are urged in the argument; that the verdict was against the weight of the evidence and that the instructions given for plaintiff were improper.

We are satisfied that the evidence abundantly sustains the foregoing statement of the facts in every particular and discloses nothing which at all modifies their legal effect. Indeed no attempt at contradiction was made except as to the exact location of the hole, as to which the difference was but a matter of inches. Some witnesses placed it right in the gutter and so wholly but barely outside of the six foot space appropriated for use as a sidewalk, though it would seem that an electric light pole so placed would have dammed such a gutter and flooded both sidewalk and wagon way, and that the hole left by its removal would have been long before that filled up by the drifting dust and washings of six or eight months. But in our judgment a clear preponderance of the positive evidence, confirmed by the circumstances, shows it was north of the bottom of the gutter and took in a part of the sidewalk. We are further of opinion that this difference is immaterial. It is said that the hole was no deeper or more dangerous than an ordinary curbstone, and the suggestion is that the case is as if a per-

son in a dark night should by a misstep fall from such a curbstone. The palpable difference is that such a curbstone is not a defect in the street and such a hole is, whether it be in a sidewalk, gutter or midstreet. Appellee had a right, with due care, to cross the street where she did, and if in so doing she was hurt by reason of such a defect negligently left in it by the city, she was entitled to recover for the damages sustained. We find in the record no evidence of any want of ordinary care on her part, but quite enough to warrant the finding of culpable negligence on that of the city. The verdict was so clearly right that error in instructions, sufficient to defeat it, must be singularly gross.

Complaint is made of the first, second, third, fifth, eighth and tenth, of those given for the plaintiff. These objections are all founded on familiar rules of law, but we find that each error complained of is in this case either immaterial, inapplicable or fairly obviated.

Thus it is said, that the first and second authorize a recovery for injury by a defect in the sidewalk, without restriction to the particular defect alleged. But other instructions on both sides, refer expressly and solely to the hole, and there is no evidence pointing to any other. The jury therefore could not have been misled on that question.

The third begins with the assertion that it was the defendant's duty "to keep in reasonably safe condition its sidewalks within its corporate limits;" which is too broad; but the instruction is comprised in a single sentence, and concludes with the declaration of its liability for the injury to plaintiff by the defect if she exercised proper care, and further, "provided the defendant, by the exercise of reasonable diligence, could have ascertained such defect and repaired the same," which properly qualified it.

By the fifth the jury were authorized to consider, in connection with the other facts, the condition of the street light furnished by the city, with reference to the question of negligence. That was proper. *City of Freeport v. Isbell*, 83 Ill. 443.

The eighth instructs the jury, in substance, that if they

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find every material fact alleged in the declaration (reciting them and including negligence) proved as alleged, their verdict should be for the plaintiff. It is said this makes negligence a question of law and invades the province of the jury. We hold it does not. The tenth is a statement of the rule, if the injury was the effect of the defect and accident combined, and in our opinion is correct, being distinguished from the case cited (3 App. 414) by the qualification, "provided the jury believes from the evidence that the city authorities were guilty of negligence in not remedying such defect," the omission of which from the instruction there considered was its only fault. We may observe, however, that we do not clearly see any element of accident in this case, though the defendant also asked and got an instruction upon the same point. The eleventh is in substance and almost *verbatim* like the eighth, already noticed. Ten were given for the city as asked, which fully presented all the law contended for on its behalf. Perceiving no material error in the record, the judgment will be affirmed.

**C. H. Martin, Assignee of Granville Wheelberger, v.
C. H. Knights et al.**

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155 486

1. **PARTIES**—*Motion to Set Aside a Judgment*.—An assignee for the benefit of creditors is a proper party to a motion to vacate a judgment confessed by the assignor before making the assignment.

2. **CONFESSION OF JUDGMENT**—*Filing of Papers*.—Where the papers in a proceeding to confess judgment, presented to the clerk, were by him not filed, but were marked "judgment entered on this note" and signed by him, and by his consent placed in a vault for safe keeping, it was held to be a mere irregularity and did not vitiate the judgment.

3. **EXECUTION**—*Issued Before Judgment is Recorded*.—An execution issued upon a judgment before the judgment is entered in the record, is void.

Memorandum.—Motion to quash an execution. Appeal from the Circuit Court of Fulton County; the Hon. JEFFERSON ORR, Judge, presiding. Heard in this court at the May term, 1894. Reversed and remanded. Opinion filed October 29, 1894.

APPELLANT'S BRIEF, DANIEL ABBOTT AND JOHN A. GRAY,
ATTORNEYS.

Appellant contended that the papers filed with the clerk did not authorize or support the entry of a judgment, and that the execution was issued before the judgment was entered, and is therefore void.

To authorize the entry by the clerk of a judgment in vacation, there must be filed with him a declaration, a warrant of attorney, proof of its execution and a *cognovit*, and there must be a strict compliance with the statute. *Gardner v. Bunn et al.*, 132 Ill. 403; *Campbell v. Goddard*, 117 Ill. 251; *Little et al. v. Dyer*, 138 Ill. 273.

The clerk has no power to enter judgment by confession in vacation, without proof being filed of the execution of the power of attorney. *Durham v. Brown*, 24 Ill. 94; *Roundy v. Hunt*, 24 Ill. 598.

The execution was issued and placed in the hands of the sheriff before the judgment was entered, and is therefore void.

Our Supreme court say: "All know that the filing of such (necessary) papers in term time without the entry of a judgment order would not constitute a judgment, or authorize the issuing of an execution, and we must presume that when the General Assembly authorized an entry of judgment in vacation, it was to be done in the same form as when entered in court in term time." *Ling et al. v. King & Co.*, 91 Ill. 571; *Poppers v. Meager*, 33 Ill. App. 19.

"In vacation, when confession of judgment is entered by the clerk, the judgment order, as held in *Ling v. King*, 91 Ill. 751, must be entered before a judgment can be held to be in existence." *Jasper et al. v. Schlesinger*, 22 Ill. App. 641; *Cummings v. Holmes et al.*, 109 Ill. 19.

An execution issued before judgment, confessed in vacation, has been entered up by the clerk, is void, and can not be cured by subsequent amendment of the record. *Baker v. Barber*, 16 Brad. 625; *Humphreys, Newton & Co. v. Swaim*, 21 Ill. App. 232; *Swaim v. Humphreys*, 42 Ill. App. 371.

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Appellant's motion to amend the record to conform to the facts should have been allowed. If such amendment had been made, the execution would have been void, and quashed upon motion, or could have been attacked collaterally, or writ of error would lie to reverse the judgment. *Askew v. Goddard*, 17 Brad. 377; *Doty v. Colton*, 90 Ill. 453.

If the record as it remains in the Circuit Court does not state the facts as they actually occurred, defendant should have made application to have the court correct the record, so as to make it speak the truth. *Roche v. Beldan*, 119 Ill. 323; *Dillman v. Nadelhofer*, 23 Ill. App. 169.

Chap. 25, Starr & Cur. Stat., Vol. 3, p. 250, prescribes what books are to be kept by the clerk; among others are the following:

"Third. Proper books of record, with indices, showing the names of all the parties to any suit or judgment therein recorded, with a reference to the page where it is recorded.

"Fourth. A judgment and execution docket, in which all final judgments shall be minuted at the time they are entered, or within sixty days thereafter, in alphabetical order, by the name of every person against whom the judgment is entered, showing in proper columns the names of the parties, the date, nature of the judgment, amount of debt, damages and costs in separate items for which it is issued, to whom issued, when returned, and the manner of its execution.

"Fifth. A fee book.

"Seventh. Such other books of record and entry as are provided by law, or may be required in the proper performance of their duties."

The universal practice under this statute has been to record a "judgment order in the book of record" mentioned in "Third" subdivision above noted. And the statute requires it to be therein recorded.

"The judgment must in fact be entered up." *Cummins v. Holmes et al.*, 109 Ill. 19. "Here, then, were all the facts appearing to require the clerk, under the statute, to enter

the legal conclusion, but that was not done, and until done there was no judgment." *Ling v. King & Co.*, 91 Ill. 751.

The judgment "must be actually entered of record;" "whether the clerk had written up the judgment" and "a judgment of record to support it (execution)," are expressions of the court found in *Swaim v. Humphreys*, 42 Ill. App. 371, showing what is required to constitute "a judgment."

"In vacation, where a confession of judgment is entered by the clerk, the judgment order must be entered, before any judgment can be held to be in existence. The judgment and the record evidence of it is in that case the same thing." *Jasper et al. v. Schlesinger*, 22 Ill. App. 641.

The judgment under said "Fourth" subdivision is to be "minuted" at the time it is "entered, or within sixty days thereafter." Plainly showing that it was not a necessary part of the "judgment order," required to be entered or recorded before the issuance of execution, and that the word "entered" had reference to the recording of the judgment order in the book required by the "Third" subdivision.

Example of what is not a sufficient judgment or record, are found in *Meyer v. Village of Teutopolis*, 131 Ill. 555; *Edwards v. Evans*, 61 Ill. 492; *Faulk v. Kellums*, 54 Ill. 190; *Martin v. Barnhardt*, 39 Ill. 10; *Alton Lime & Cement Co. v. Calvey*, 41 App. 598; *Haines v. The People*, 19 App. 359.

It requires at least an order and finding to make a valid judgment. *Sears v. Sears*, 3 Gilman 48; *Stevison et al. v. Earnest*, 80 Ill. 519.

For the meaning of the words "record of any judgment," see *Vail v. Iglehart*, 69 Ill. 334. "A judgment must be proved by the record itself." *Moore v. Bruner*, 31 App. 403. "There must be a record or memorial of the proceedings of a court of record in every cause in order to support and give effect to such proceedings." *Am. and Eng. Ency. of Law*, Vol. 20, pp. 476 and 477. "The judgment must be certain or capable of being made so, and it must be a final judgment. It must have been duly entered, though perhaps not in accordance with the rules of the common law."

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APPELLEES' BRIEF, CLARK VARNUM, ATTORNEY.

• No person but a party to a judgment or execution can move to set aside the judgment or quash the execution. Sec. 65, Chap. 110, Rev. Stat. Ill.; *Bonnell v. Neely*, 43 Ill. 288.

A stranger to the record can not interfere to quash the levy or the execution. *Hitchcock v. Roney*, 17 Ill. 231; *Swiggart v. Harber*, 4 Scam. 362; *Oakes v. Williams*, 107 Ill. 154.

If the court has jurisdiction to render a judgment, such judgment can not be questioned by anybody except by a party to the record of such judgment. *Freydendall v. Baldwin*, 103 Ill. 929; *Wimberley v. Hurst*, 33 Ill. 166; *Cemetery Co. v. People*, 92 Ill. 619; *Maloney v. Dewey*, 127 Ill. 305.

The assignee has no authority to appear in another court and prosecute a suit without an order of the County Court authorizing him to do so. *Baker v. Barber*, 16 Bradw. 621.

The assignee is not the representative of the creditors but is merely the agent of the assignor. *Bouton v. Dement*, 123 Ill. 149; *Ide v. Sayer*, 129 Ill. 325; *Republic Insurance Co. v. Swigert*, 135 Ill. 176.

Judgment by confession will not be vacated to let in a defense when the records fail to show that a defense can be successfully made. *Holmes v. Parker*, 125 Ill. 478; *Hemstead v. Humphrey*, 38 Ill. 90; *Rising v. Brainard*, 36 Ill. 79; *Stuhl v. Shipp*, 44 Ill. 133; *Knox v. Savings Bank*, 57 Ill. 330; *Farwell v. Meyer*, 36 Ill. 510.

MR. PRESIDING JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This was a motion to quash an execution issued upon a judgment confessed in vacation, and to set aside the judgment. The ground mainly urged was that when the execution was issued the judgment had not been fully written up, though it had been properly noted and indexed in the judgment and execution dockets and in the fee book as well as in the index of the court record.

After the judgment was confessed the judgment debtor made a general assignment for the benefit of creditors.

The motion was made in the name and on behalf of the debtor and the assignee, but before decision the debtor formally withdrew the motion so far as he was able to do so and it was afterward prosecuted by the assignee. It is now urged that it was not competent for the latter to urge the relief sought because he was not a "party" to the judgment.

We think the assignee may be regarded as the proper "party" to make the motion. *Baker v. Barber*, 16 Brad. 625; *Jenkins v. Greenbaum*, 95 Ill. 11; *Conkling v. Ridgely*, 112 Ill. 39; *Roche v. Beldan*, 119 Ill. 321.

It is argued that the judgment is void because the original notes upon which it was entered were not filed with and left in custody of the clerk.

It appears that they were presented to the clerk and by him marked "judgment entered on this note," etc., which indorsement was signed by the clerk, and by his consent they were placed in the vault of one Fox for safe keeping. We regard this as but a mere irregularity which should not vitiate the judgment.

It is urged, however, on behalf of the appellee, that the formal entry of judgment in what is termed the "journal," or more properly the "record," is not essential when the judgment is by confession. We can not agree with this position and are of opinion such entry is indispensable.

As already stated the chief question is whether it is competent to show that the formal record of the judgment which professes to have been written on the 13th of June, when the judgment was confessed, was in fact not completed until the 14th or 15th, after the execution was issued.

Counsel for appellant urged that upon the authority of *Ling v. King*, 91 Ill. 571; *Cummins v. Holmes*, 109 Ill. 19; *Baker v. Barber*, *supra*, and *Humphreys v. Swaim*, 21 App. 232, the evidence was competent, and that the execution should have been held void, while the appellee insists that as the record imports verity the evidence is not admissible. The cases cited are to the effect that it is competent to show that the execution was issued before the judgment order was

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entered up, although both appear as of the same day, and that this does not contradict the record, but merely shows which was done first. In the present case the record, though purporting to have been written on the 13th, the date of the execution, was not written until after the execution was placed in the hands of the sheriff. To prove this, it is said, does not necessarily contradict the record in its statement that it was entered on the 13th, but merely proves that before the record was in fact written up the execution was issued.

The only proof necessary was that when the execution was issued the judgment had not been written.

It was not material, as it was not competent, to prove it was not written the day it purported to be, but this was also shown.

Now, because the latter fact also appeared, which tended to impeach the record, was no reason for excluding and refusing to consider the fact that the record was not written until after the execution was issued. If it must be excluded then it follows that the law admits proof by which it may be shown that the execution was issued before the judgment was written if both were done the same day, but will not admit proof that the execution was first, when the proof also shows that the judgment was not written the day it purports to be, but on a later day, which would be manifestly absurd.

The only point at issue is, which was first, and the only proof necessary need go no further.

So far as it does go further it is irrelevant and unimportant, but the relevant portion is not to be discarded.

Conceding the doctrine taught by the cited cases to be correct it should control here.

Without discussing the question and without intimating what view we might be inclined to take if it were *res nova* we are disposed to follow those cases and must therefore hold that the execution was void.

The judgment is reversed and the cause remanded with directions to quash the execution.

John O. Whitenack v. Annie Agartt et al.

1. **FRAUDULENT CONVEYANCES—*Husband to Wife.***—A deed of conveyance from a husband to his wife without an adequate consideration is void as against creditors, whether lien holders or not, and as to such the title does not pass.

2. **SHERIFF'S SALES—*Certificate Void After Five Years.***—Where lands are sold by a sheriff upon an execution and a certificate of sale executed and delivered to the purchaser, unless a deed is taken within five years from the date of the sale, the certificate becomes void.

3. **HUSBAND AND WIFE—*Conveyances—What the Wife Takes.***—Where a husband makes a conveyance of lands to his wife, notwithstanding the conveyance is without consideration, she takes whatever interest he has, subject only to the rights of his creditors.

Memorandum.—In equity. Appeal from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Proceedings to set aside a conveyance of real estate; decree for defendants; appeal by complainants. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 14, 1894.

APPELLANT'S BRIEF, SAUNDERS & BOWERS AND PATTON, HAMILTON & PATTON, ATTORNEYS.

Where a wife allows her husband to invest her capital in his own name, and thereby obtain credit on the faith of his being the owner of the same, she will not be allowed to interpose her claim to the property so acquired, to the injury of her husband's creditors. *Hocket v. Bailey*, 86 Ill. 74; *Patton v. Gates*, 67 Ill. 164; *Wortman v. Price*, 47 Ill. 22; *Lowentrout v. Campbell*, 130 Ill. 503; *Coale v. Moline Plow Co.*, 134 Ill. 350; *Beeson v. Eveland*, 26 N. J. Eq. 463; *Budd v. Alkinson*, 30 N. J. Eq. 530.

A transfer of property, either directly or indirectly, by an insolvent husband to his wife, is justly regarded with suspicion, and unless it clearly appears to have been entirely free from wrong intent to withdraw the property from the husband's creditors, or the presumption of fraud be overcome by satisfactory affirmative proof, it will not be sustained. *Burt v. Timmons*, 29 W. Va. 441; *Stockdale v. Har-*

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ris, 23 W. Va. 499; *McMasters v. Edgar*, 22 W. Va. 673; *Rose v. Brown*, 11 W. Va. 122; *Core v. Cunningham*, 27 W. Va. 206; *Herzog v. Weiler*, 24 W. Va. 203; *Maddox v. Epler*, 48 Ill. App. 265.

By a levy on land under an execution the creditor acquires no property in the land, absolute or conditional. Such levy, unless consummated by a sale, and then only to the extent realized, is no satisfaction of the judgment. 2 *Freeman on Executions*, 929; *Cassell v. Morrison*, 8 Brad. 175; *Robinson v. Brown*, 82 Ill. 279; *Gold v. Johnson*, 59 Ill. 62; *White v. Graves*, 15 Tex. 183; *Hoard v. Wilcox*, 47 Pa. St. 60.

JOHN C. SNIGG, attorney for appellees.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

The bill herein was filed against Annie Agartt and August Agartt, her husband, to set aside and declare void a deed of conveyance from him to her of eighty-four acres of land therein described, executed December 24, 1883, and subject the land to the payment of a judgment obtained by appellant against him on October 8, 1884, for \$538.59 and costs, on a promissory note made and delivered before the conveyance complained of. It charges that the deed was a sham, made without any consideration therefor and to defraud his creditors, particularly the complainant. It required the defendants to answer under oath the allegations it contained and a number of interrogatories thereto attached. They so answered, in substance, that the land was purchased by August, but with money of his wife, derived from the estates of her father and grandfather, and that though the legal title of record was in him, the equitable title was hers. To the sixth interrogatory, which was addressed to him alone, and was as to the consideration he received from his wife for the land, he answered that it was between \$2,000 and \$2,100 which came into her possession from those estates about the time of their marriage, in 1868; that she let him

have the money, all of which went into this with other land which he then also purchased from Whitbur for \$5,000, obtaining the rest by a mortgage to Nusbaum; that he owed her the money and the interest thereon, and that for this debt he sold to her the farm and personal property, the land being incumbered by the Nusbaum mortgage for \$2,200. To the ninth and eleventh, addressed to the defendant Annie, she answered that according to her recollection she received from her father's estate \$1,800 or \$1,900, and from her grandfather's about \$140, all of which went into the land; that this, with lawful interest from date, she let her husband have, and it now amounts to \$3,000. They do not say that she took a note or any written evidence of the loan, or that she ever received or claimed any interest. They have lived on the land from the time he purchased it, and to all appearance he has managed it since the conveyance to her as before, but she says that since she received the deed she has controlled it with his assistance as her agent, and that although no definite compensation has been agreed upon, he is to have his living and a reasonable compensation for his labor.

Their answers comprise all the evidence on their part upon the question of fraud in the conveyance. Complainant's proof was the note, judgment, execution returned unsatisfied, and deed, with the testimony of witnesses from the neighborhood tending to show that August occupied and used the land before and after the conveyance to the wife, as farmers who own the farms they occupy usually do; that it was understood he owned it, because of that fact, and that nothing to the contrary had been heard by them from Agartt or his wife, or from any assertion in the presence of either. He introduced as a witness the guardian of Mrs. Agartt, whose recollection was that the money he received from the administrators and paid to her amounted in all to \$1,348.45, and the date of the payment was March 18, 1870, after her marriage. Another witness, also called by complainant, testified among other things to a conversation with August Agartt about this litigation in which he said

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he had transferred this land to his wife to indemnify her for some money she had received from her father's estate, and that his indebtedness to complainant was a security debt.

There is no reason to doubt that when Agartt purchased the land he had no money or property of his own except a team, wagon and harness, worth about \$300, and was receiving a pension, the amount of which was not stated, nor that a considerable sum of money, derived by his wife from the estates mentioned, was applied by him in part payment for it. But that it was either loaned to him, or being hers, was so applied that a trust for her in the land resulted, is, by the evidence, certainly left very uncertain in the light of the authorities. The oral testimony was all submitted in the master's report, so that the court below had no advantage of us from seeing and hearing the witnesses. Whether the decree dismissing the bill was based on the conclusion that a preponderance of the evidence showed a *bona fide* indebtedness of the husband to the wife which was an adequate consideration for the conveyance to her as a preferred creditor, or that it was well made in execution of a resulting trust in which he held the legal title, we have no means of knowing, and it may have been rendered, and in our opinion, should be affirmed, for another reason.

In their answer the defendants further say that by virtue of an execution issued January 30, 1885, upon this same judgment, the sheriff of Sangamon county levied upon, and on March 4th, following, sold, all of the land described in the bill, as the property of August Agartt, for the sum of \$19.48 to one Joseph F. Bunn, who then received from said sheriff and now holds his certificate of such purchase; wherefore they say that as against each of the defendants, and particularly the defendant Annie Agartt, complainant is estopped from maintaining this proceeding to subject this land to sale on another execution to be issued upon this judgment.

On leave obtained, complainant filed an additional replication admitting the facts averred in the answer, and alleging that the sale to Bunn was made without his knowledge, and that he was not aware that any certificate of purchase

had been issued by the sheriff on such sale when he filed the bill herein; and further, that he has since obtained possession of said certificate; that no deed has ever been issued on it by the sheriff, and that he is now ready and willing to surrender it for cancellation.

The execution, dated January 30, 1885, the returns thereon showing the levy and sale, and the certificate of purchase dated March 7, 1885, were all put in evidence, and complainant testified that he got the certificate from Bunn, but didn't know when; never read it, but understood what it was; did not know where it was (at the time he testified); he took it back to Saunders & Bowers, his attorneys, from Bunn; never took out any deed in pursuance of it, nor transferred it to anybody; was not present at the sale; didn't know anything about it until it was done; and that Mr. Haynes (of Saunders & Haynes, his attorneys,) said he would manage it and they could go home.

He did not examine either of the attorneys named, nor Mr. Bunn, and his own testimony fails to support his additional replication in a material point. The proceedings on the execution of January 30, 1885, were doubtless managed by his attorneys, and he is chargeable with notice of them. He did not state specifically, or with reference to the time of any other event, when he received the certificate from Bunn, or that he paid anything for it. Without reading it, but with the understanding that it was the sheriff's certificate of Bunn's purchase, he took it to his attorneys. It is, therefore, presumable that Bunn made the purchase for him under the direction or at the request of his attorneys; that he knew Bunn held the certificate for him, and that he could have obtained a sheriff's deed in pursuance of it within the five years from the expiration of the time for redemption limited by the statute. R. S., Ch. 77, Sec. 30.

Appellant claims that August Agartt's conveyance to his wife was wholly without consideration, and therefore void as against creditors then existing, whether lien holders or not; and so we understand the law. His claim accrued before such conveyance and was subsisting in full force at

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that time. The conveyance if wholly without consideration, was therefore void as against him, and the title to the land remained in August Agartt. The sheriff's deed, if regular, would have conveyed to the rightful holder of the certificate of purchase all of Agartt's interest. There is nothing in the record going to show anything irregular in the judgment, execution or sale thereon to prevent the full legal operation of a sheriff's deed in pursuance of the certificate of purchase, or that the purchaser or the appellant was at all deceived or misled as to the purchase. But a deed was never obtained nor applied for by Bunn or appellant, and more than five years had elapsed from the expiration of the time for redemption, before the bill herein was filed. By this neglect to get a deed the certificate became void. The failure to realize all the fruit of the sale that he might have obtained was due to his own *laches*. No reason is perceived why a court of equity should have set aside the sale and satisfaction of the judgment *pro tanto*, if application therefor had been made at any time. By the sale and certificate and failure to redeem an absolute right to the entire interest of August Agartt passed to the holder of such certificate. The land had contributed all that the judgment creditor deliberately asked toward the satisfaction of his judgment, and was not subject to be sold again on execution upon the same judgment. Mrs. Agartt, however, by the conveyance from her husband, notwithstanding there was no valuable consideration for it (if there was none), had taken whatever interest he had in the land, subject only to the lien of appellant's judgment afterward obtained against him. His pre-existing claim became merged in the judgment, and the lien of that judgment has been exhausted as to this land, without fruit, through his own negligence, and not the fault of appellees or of the law. *Trustees of Schools v. Love*, 34 Ill. App. 418. For further satisfaction he must look to other means. Having no such lien when this bill was filed, it could not be maintained. The decree will therefore be affirmed.

Terre Haute and Indianapolis R. R. Co. v. Richard Doyle.

1. RAILROAD COMPANIES—*Care in Using Engines.*—The law does not permit the employes of a railroad company to use the cars and engines of the company in such a manner as to unnecessarily frighten the teams of people passing in proximity to the track.

Memorandum.—Action for injuries caused by frightening horses. In the Circuit Court of Edgar County; the Hon. EDWARD P. VAIL, Judge, presiding. Declaration in case; plea, not guilty; trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1894, and affirmed. Opinion filed October 29, 1894.

T. J. GOLDEN and J. E. DYAS, attorneys for appellant.

DUNDAS & O'HAIR, attorneys for appellee.

MR. PRESIDING JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The appellee recovered a judgment against appellant for \$75, for injuries sustained to a horse and wagon, caused, as was alleged, by the reckless and careless conduct of an engineer on appellant's road in discharging steam from an engine in his charge whereby the appellee's team became frightened and ran off. It was alleged that the steam was unnecessarily discharged and that the engineer might well have stopped it and so might have avoided scaring the team. It appears that the engine was being run back and forth on the track for the purpose of "limbering" it, the appliances being new. This part of the track was in close proximity to the highway and was not the safest place for such exercise. The maxim "*sic utere tuo*," etc., is applicable.

It is urged the driver of the team had partaken of too much liquor and was intoxicated, so that he was unfit to handle the team and did not use ordinary care. This was presented to the jury and an instruction was given as to the law in this view of the case. No complaint is made of the ruling

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of the court in admitting evidence or in giving instructions and it is a pure question of fact whether the evidence warrants the verdict.

We find no occasion to interfere, and the judgment will be affirmed.

**Franklin C. Orton, William N. Bock, impleaded with
John H. Starkey v. The City of Lincoln.**

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1. CITIES AND VILLAGES—*Power of a City Clerk to Receive License Money.*—A clerk of a city incorporated under the general law has authority to receive license money from dramshop keepers, and the sureties upon his official bond are responsible for his failure to account for the same.

Memorandum.—Action upon a city clerk's bond. In the Circuit Court of Logan County; the Hon. GEORGE W. HERDMAN, Judge, presiding. Declaration in debt; trial by jury; verdict and judgment for plaintiff; appeal by defendants. Heard in this court at the May term, 1894, and affirmed. Opinion filed October 29, 1894.

APPELLANTS' BRIEF, BEACH & HODNETT, ATTORNEYS.

Appellants contended that it not being the duty of the city clerk to collect saloon license money, the sureties on his bond are not liable therefor. Sec. 16 Dramshop Act; Brandt on Suretyship and Guaranty, Sec. 451; People v. Pennock, 60 N. Y. 421. The power to make it the duty of the city clerk to collect and reserve saloon license money must be found in the charter, which is the general incorporation act, and is not given therein. Cook County v. McCrea, 93 Ill. 236; 1 Dillon Mun. Corp., Secs. 55 and 251; Rawlins v. City of Cerro Gordo, 32 Ill. App. 215; Emmons v. City of Lewiston, 132 Ill. 380; Heusing v. City of Rock Island, 128 Ill. 465.

After organization under the general law of the State, all ordinances in conflict with the general law are repealed. City of Cairo v. Bross, 101 Ill. 475. Courts bound to take notice of organization under the general law. City of Rock Island

v. Cuinely, 126 Ill. 408. The liability of sureties is *strictissimi juris*, and can not be extended by the acts of others. People v. Pennock, 60 N. Y. 426; McCluskey v. Cromwell, 1 Kern. (N. Y.) 593; Supervisors v. Bates, 17 N. Y. 242; Loan Ass'n v. Nugent, 11 Vroom (N. J.) 215. A surety of an officer is not liable for money received by his principal out of the line of his duties. People v. Pennock, 60 N. Y. 426; Henckler, Imp., etc., v. County Court, 27 Ill. 38; State v. White, 10 Rich. (S. C.) 442; Leigh v. Taylor, 7 B. & C. 491; Nolley v. Calloway County, 11 Mo. 447. The liability of a surety is strictly construed and can not be extended by implication. Stull v. Hance, 62 Ill. 52; McLain et al. v. People, use, etc., 85 Ill. 205; People v. Tompkins et al., 74 Ill. 482; Governor v. Lagow, 43 Ill. 134.

A surety on an official bond is not liable for losses caused by the misconduct of the obligee. The People v. Toomey, 122 Ill. 308; Murfree on Official Bonds, Secs. 755, 788; O'Donohue v. Simmons, 31 Hun (N. Y.) 267; Brandt on Suretyship, Sec. 457; Pickering v. Day, 3 Houston, 474; Connell v. Crawford, 59 Pa. St. 196.

The law enters into the contract and is part of it. Murfree on Official Bonds, Sec. 193; People v. Pennock, 60 N. Y. 426.

To entitle the plaintiff to recover, it must prove its right by a preponderance of the evidence. Lincoln v. Stowell, 62 Ill. 84; Peaslee v. Glass, 61 Ill. 94; C., R. I. & P. R. R. Co. v. Easlenger, 44 Ill. 476; Boudreau v. Boudreau, 45 Ill. 480.

It is held that all corporate acts beyond the scope of the powers granted, are void. To doubt the power is to deny it. 2 Kent's Com. (12th Ed.), 288-289; Cooley's Const. Lim., 191; Dillon on Mun. Corp. (3d Ed.), Sec. 89; Bank of United States v. Dundridge, 12 Wheat. (U. S.) 68; Railroad Co. v. Harris, 12 Wall. (U. S.) 81; People v. Village of Crotty, 93 Ill. 180; City of Champaign v. Harmon, 98 Ill. 491.

APPELLEE'S BRIEF, E. C. MOOS AND E. D. BLINN, ATTORNEYS.

Appellees contended that the city clerk has the power under the statutes of this State to collect moneys for licenses;

citing sections 68, 105, 106, 107 and 108, chapter 24, Vol. 1, Starr & Curtis' Annotated Statutes.

MR. PRESIDING JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The appellee recovered a judgment for \$1,122.46 against appellants and John H. Starkey, in an action of debt on the bond of said Starkey as city clerk. The principal question is whether the clerk had such authority to receive money paid for dramshop licenses as to make the sureties responsible for his failure to account therefor.

The bond was given to cover the term of two years beginning April 16, 1889, and was conditioned that the principal should "faithfully discharge the duties of his office and pay over all moneys that may come to his hands by virtue thereof." It was customary for the clerk to receive moneys paid in for licenses of all kinds, and account to the city treasurer, and in this way large amounts passed through his hands during the term in question, all of which was duly accounted for except the sum for which this judgment was rendered.

Much stress is laid by the appellants upon the language of Sec. 16 of the Dramshop Act, which provides:

"That hereafter it shall not be lawful for the corporate authorities of any city, town or village in this State to grant a license for the keeping of a dramshop, except upon the payment in advance into the treasury of the city, town or village granting the license, such sum as may be determined by the respective authorities of such city, town or village, not less than at the rate of five hundred dollars (\$500) per annum."

This section was in force before the bond was given and it is argued that the money must be paid to the city treasurer by the party seeking the license, and that the clerk is not authorized to handle it at all.

In order to properly determine the question, it is necessary to consider what was the main purpose in view in the enactment of this provision, as well as to inquire what other statutory provisions and ordinances of the city relating to

the subject, were then in force, since all such provisions must be taken into account in order to ascertain the true construction of this provision.

The main purpose in this enactment was, probably, to provide that the license money should be paid in advance. The words "into the treasury," etc., are used in a general sense to indicate the final destination of the money, but not to designate the medium. It is not required that the money shall be paid to the treasurer in advance, but merely into the municipal treasury.

Section 68, of chapter 24, R. S., provides that: "All fines and forfeitures for a violation of ordinances, when collected, and all moneys collected for licenses, or otherwise, shall be paid into the treasury of the corporation at such times and in such manner as may be prescribed by ordinance."

Section 105 of the same chapter provides: "The city comptroller (if there shall be any city comptroller appointed, if not, then the clerk,) shall exercise a general supervision over all officers of the corporation charged in any manner with the receipt, collection or disbursement of corporate revenues, and the collection and return of all such revenues into the treasury."

Section 108 provides: "When there shall be appointed in any city a comptroller, the city council may, by ordinance or resolution, confer upon him such powers, and provide for the performance of such duties by him, as the council shall deem necessary and proper, and all the provisions of this act relating to the duties of city clerk, or the powers of the city clerk, in connection with the finances, the treasurer and collector, or the receipt and disbursements of the money of such city, shall be exercised and performed by such comptroller, if one there shall be appointed, and to that end and purpose, wherever in this act heretofore the word 'clerk' is used, it shall be held to mean 'comptroller,' and wherever the 'clerk's office' is referred to, it shall be held to mean comptroller's office."

From the first of these provisions it is clear that the legislature contemplated that money would, in various cases,

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come to the hands of city officials other than the treasurer, and through them pass to him. The two latter gives the clerk general supervision of the fiscal affairs with all the functions usually exercised by a comptroller and thus provide for a situation which would make it convenient and very often indispensable that corporate funds should frequently be in hands of the clerk, temporarily, at least.

It would naturally happen so very often, and the legislature must have so intended. At the time this bond was given the following provisions of the ordinances of the city were in force:

“Section 6. The city clerk shall keep a license register in which he shall enter the name of each person licensed, for what purpose licensed, the place of business, the date of the license, the amount paid therefor, and the date and the expiration of the same. He shall pay into the city treasury on the first Monday of each month all moneys received by him on account of license; he may charge and receive a fee of one dollar for each license issued by him, and a fee of fifty cents for certifying the consent of the city council to the assignment, transfer or change of the place of business of any license.”

“Section 2. All city officers, except the city clerk, collecting or receiving any money on account of the city, shall pay the same as fast as collected to the city clerk, in the same kind of funds as received by them, and shall, on the first Monday of each month, report to the city council an accurate statement of all moneys received by them for the preceding month, specifying the amount, from whom and on what account received. The city clerk shall, in like manner, pay over all city money received by him to the city treasurer, and shall make a like report, provided that any city officer collecting any city money or any fine or any execution, shall pay the same over to the court imposing said fine or issuing said execution.”

Here is clear recognition of the power of the clerk to receive such funds.

These provisions were enacted before the city was reor-

ganized under the general law and continued in force until repealed according to the terms of Sec. 11, of Ch. 24.

An ordinance passed in 1885, provided that dramshop licenses might be granted by the council for a period not exceeding one year and not less than three months, upon payment "into the city treasury in advance," at the rate of \$500 per annum, it being designed, no doubt, to comply with the statute in reference to the amount and advance payment, and the words "city treasury" being used here, as similar words are in the statute, in a general sense.

Considering all these enactments, statutory, as well as municipal, together, we entertain no doubt that the clerk had authority to receive license money and that his bond should protect the city against loss in that behalf. The judgment is affirmed.

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**Franklin C. Orton, Stephen A. Foley, impleaded with
John H. Starkey v. The City of Lincoln.**

1. CITIES AND VILLAGES.—*Authority of Clerk to Receive Dramshop License Money.*—A clerk of a city or village, or city organized under the general law, has, in his official capacity, authority to receive money paid for dramshop licenses.

Memorandum.—Action upon a city clerk's bond. In the Circuit Court of Logan County; the Hon. GEORGE W. HERDMAN, Judge, presiding. Declaration in debt; trial by the court without a jury; finding and judgment for plaintiff; appeal by defendants. Heard in this court at the May term, 1894, and affirmed. Opinion filed October 29, 1894.

BEACH & HODNETT, attorneys for appellants.

E. C. MOOS and E. D. BLINN, attorneys for appellee.

MR. PRESIDING JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This was debt on the official bond of John H. Starkey, as city clerk, for the term of two years beginning April, 1891.

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The appellee recovered a judgment for \$795.47, and the main question here, as well as in the former case of Orton and Bock v. the appellee, is whether the clerk was officially authorized to receive money paid for dramshop licenses.

The condition of the bond was the same as in that case.

The same statutory provisions are to be considered, but according to the record, not the same ordinances.

The following ordinances appear:

“Section 1. The city clerk, before he enters upon the duties of his office, shall take the oath prescribed for other city officers, shall execute a bond to the city of Lincoln in the penal sum of ten thousand dollars, with such sureties as shall be approved by the city council, conditioned for the faithful performance of the duties of his office and the payment of all moneys that may be received by him, according to law and ordinances of said city, which bond shall be filed with the city treasurer.”

“Section 3. It shall be the duty of the city clerk to make a record in suitable books of all licenses issued under the ordinances of the city, entering the name of the person licensed, the date of the license, for what purpose granted, date of expiration, the amount paid, the name of the security on the bond, and in case of vehicles, porters and runners, the number of the same, which shall also be inserted in the license, and a column may be set apart for remarks.”

“Section 11. The city clerk shall exercise a general supervision over all the city officers of the corporation charged in any manner with the receipt, collection or disbursement of corporation revenues and the collection and return of all such revenues into the city treasury. He shall have the charge, custody and control of all deeds, leases, warrants, contracts, bonds, obligations, vouchers, books and papers of every kind, the custody of which is not herein given to any other officers.”

“Section 14. Said clerk shall open and keep in a neat and methodical manner a complete set of books, in which shall be kept a detailed account of the city revenue and of each separate fund, crediting the same with all receipts or

appropriations, and charging it with all warrants drawn thereon, and he shall charge each warrant to the fund or appropriation against which it was drawn. He shall also keep an accurate account of all debts due from or owing to the city, and shall keep a correct list of all notes or other obligations given by or payable to said city with the date thereof, the person for, to whom, or by whom payable, the rate of interest, the time and manner in which the principal and interest are payable, and such other particulars as may be necessary to the full understanding thereof. Said books and all other contracts, bonds, deeds warrants, vouchers, receipts and other papers kept in said office shall be subject to the examination of the mayor, the members of the city council or any committee thereof."

Whether the other ordinances referred to in the preceding case are still in force does not appear, but, without repeating or restating the views there expressed, we are of opinion that under the ordinances here shown, and the statutory provisions which are applicable in both cases, it may be fairly said that the clerk was not exceeding his official powers when he received the moneys in question.

The judgment will be affirmed.

**Prentiss D. Cheney, Admr. with Will Annexed of the
Estate of Harriet H. Beaty, v. A. J. Langley,
Assignee of William W. Beaty.**

1. *COURTS—Concurrent Jurisdiction.*—It is a general rule that of courts having concurrent jurisdiction, the one which first obtains jurisdiction of a cause will retain it until it pronounces its final judgment or decree.

2. *SAME—Jurisdiction in Voluntary Assignments.*—The jurisdiction of the Circuit Court is conferred by the constitution, and it is not competent for the legislature to abrogate or restrict it, but in the matter of voluntary assignments, where the jurisdiction of the County Court has once attached, the Circuit Court has no right to interpose, except, perhaps, under special circumstances as a court of equity, it may interfere to prevent a failure of justice.

Cheney v. Langley.

3. *SAME—Circuit Jurisdiction Not Defeated by Voluntary Assignment.*—Where a bill is filed in the Circuit Court against a trustee, for the purpose of compelling him to render an account, he can not, by making a voluntary assignment under the statute in the County Court, while the bill is pending in the Circuit Court, compel the complainant to discontinue it, and seek his remedy in another forum.

Memorandum.—In equity. Appeal from the Circuit Court of Jersey County; the Hon. GEORGE W. HERDMAN, Judge, presiding. Bill for an accounting; dismissal on demurrer; appeal by complainant. Heard in this court at the May term, 1894. Reversed and remanded. Opinion filed October 29, 1894.

STATEMENT OF THE CASE.

The appellant, on August 16, 1892, filed his bill in chancery in the Circuit Court of the County of Jersey, State of Illinois, against William W. Beaty, for the purpose of compelling him to render an accounting of his acts and doings as agent and trustee of his mother, Harriet H. Beaty, now deceased. The summons was made returnable to the September term, 1892, of said court, at which said term the said Beaty appeared, and by consent of both parties the cause was continued to the March term, 1893. At the said March term, to wit, on March 20, 1893, said Beaty was ruled to answer said bill within sixty days, and upon replication being filed thereto, the cause to stand referred to the master in chancery to take proofs. On June 21, 1893, being one of the days of said March term, the said Beaty having failed to plead, as ordered, the bill of complaint was taken as confessed by default and cause referred to the master to take proofs of the matters stated in the bill of complaint. After judgment on default said Beaty filed his answer June 26, 1893. In August, 1893, said Beaty made a voluntary assignment of all his property, and the defendant, A. J. Langley, was appointed assignee by the County Court of the County of Piatt, in the State of Illinois. At the September term, 1893, of said Circuit Court, by consent of parties the default against said Beaty was set aside, but the testimony already taken before the master was ordered to stand, with the privilege of Beaty to cross-examine said witnesses, if he so de-

sired. He was also ruled to close the taking of his testimony by June 1, 1894. At the same term the complainant was granted leave to file a supplemental bill, making A. J. Langley, the assignee of said Beaty, a party defendant to this cause. Summons issued against said Langley, as such assignee, returnable to the March term, 1894, of said court, at which term said Langley filed his demurrer to said supplemental bill, which was sustained by the Circuit Court, and said supplemental bill was dismissed.

From the decree sustaining the demurrer and dismissing the supplemental bill and rendering judgment on the demurrer, complainant has appealed to this court for a reversal of the same.

APPELLANT'S BRIEF, THOS. F. FERNS, ATTORNEY.

County Courts have no general chancery powers, and none are conferred by the assignment act. *Ide v. Sayer*, 129 Ill. 230.

They do not possess exclusive jurisdiction of all matters pertaining to insolvent estates. *Second National Bank of Danville v. English*, 21 Ill. App. 317.

The remedy by bill in chancery for the enforcement of a trust and an accounting, will not be defeated by a subsequent voluntary assignment by the trustee for the benefit of his creditors. *Paddock v. Stout*, 121 Ill. 572.

The court first obtaining jurisdiction of a particular case, will retain it until it pronounces final judgment. *Mapes v. The People*, 69 Ill. 524; *Howell v. Moores*, 127 Ill. 68.

A judgment against an assignee in a suit brought in the Circuit Court, sustains the same relation to the assets of the insolvent estate as a judgment in the County Court. Such a judgment is not subject to the revision of the County Court, but it must enforce its payment the same as a claim allowed in that court. *Darling v. McDonald*, 101 Ill. 370.

APPELLEE'S BRIEF, O. B. HAMILTON, ATTORNEY.

Appellee contended that the jurisdiction of the County Court attaches by the making and filing of a deed of assign-

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ment, and qualification of the assignee, and he having reduced the property to possession, under the provisions of Chap. 10a, R. S., entitled "Assignments for Benefit of Creditors," the jurisdiction of such County Court is exclusive. *Freydendall v. Baldwin*, 103 Ill. 325; *Hanchell v. Waterbury*, 115 Ill. 220; *Field v. Ridgely*, 116 Ill. 424; *Farwell v. Crandall*, 120 Ill. 70; *Wilson v. Aaron*, 132 Ill. 238.

MR. JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

This was a bill in equity filed in the Circuit Court of Jersey County to compel an alleged trustee to render an accounting of his trust.

One of the original branches of equity jurisprudence was the enforcement of trusts. Under and by force of Sec. 12 of Art. 6 of the Constitution of 1870, the Circuit Court has original jurisdiction in all cases in equity.

Hence it had jurisdiction of the subject-matter of the bill, and having first obtained jurisdiction of the person of the alleged trustee, it had full power to proceed to a final decree. Even if it be conceded that the County Court of Piatt County subsequently obtained jurisdiction over the same subject-matter by the voluntary assignment made by the alleged trustee for the benefit of his creditors, yet it would by no means follow that the Circuit Court of Jersey County was thereby deprived of its power and authority in the cause. It is a general and well grounded rule that the court first obtaining jurisdiction of a cause will retain it until it pronounces final judgment or decree. *Mapes v. People*, 69 Ill. 524; *Howell v. Moore*, 127 Ill. 68.

This rule is distinctly recognized in *Hanchett v. Waterbury*, 115 Ill. page 229, where, in an additional opinion filed in the cause, it was said: "The powers and jurisdiction of this (Circuit) Court are conferred by the constitution and it is therefore not competent for the legislature to abrogate or restrict them. But what we intend and do hold is that in the matter of voluntary assignments, where the jurisdiction of the County Court has once attached, no other court has the right to interpose except, perhaps, under special circum-

stances a court of equity may interfere to prevent a failure of justice. In thus holding we simply recognize and give effect to the long established rule, that in case of concurrent jurisdiction, the court which first obtains it will have precedence."

The alleged trustee, by making a voluntary assignment under the statute in the County Court, while the bill in equity was pending in the Circuit Court, could not compel the appellant to discontinue or dismiss the bill in chancery, and seek another remedy in another forum.

Upon the contrary the appellant had full right to proceed with the cause in the Circuit Court. The appellee, assignee, was a proper party thereto and ought, we think, have been required to answer the supplemental bill.

It follows that the decree sustaining the demurrer to and dismissing the supplemental bill, must be, and it is, reversed, and the cause remanded with directions to the Circuit Court to overrule the demurrer and require the assignee to answer. Reversed and remanded with directions.

**Prentiss D. Cheney, Admr. with Will Annexed of the
Estate of Harriet H. Beaty v. William W. Beaty.**

1. EVIDENCE—*Acts and Declarations of Agents.*—Where a person holds negotiable notes of another, as agent of the payee, and payments have been made upon them, it is his right to know, and the agent's duty to inform him, what credits have been given on the notes and whether they are still in the agent's possession; and if, upon request, such agent fails to do so, and he submits, for examination, a memorandum of the credits claimed, what the agent said and did in relation to it, tending to show that the memorandum was correct in whole or in part, is competent evidence against the payee or his personal representatives in case of his decease.

2. PRACTICE—*Rejected Instruments to be Preserved in Bills of Exception.*—Where an instrument is offered in evidence and its admission is refused, if the party offering it desires to assign its refusal as error, the instrument as well as the offer, refusal, exception, etc., must be preserved in a bill of exceptions.

Cheney v. Beaty.

Memorandum.—Assumpsit. In the Circuit Court of Jersey County; the Hon. GEORGE W. HERDMAN, Judge, presiding. Declaration on promissory notes; plea of the general issue; trial by jury; verdict and judgment for plaintiff; appeal by plaintiff. Heard in this court at the May term, 1894, and affirmed. Opinion filed October 29, 1894.

THOS. F. FERNS, attorney for appellant.

O. B. HAMILTON, attorney for appellee.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

This was an action of assumpsit against appellee as maker of two promissory notes payable to the deceased, one of June 26, 1883, for \$1,300 at three years, and the other of July 21, 1883 for \$500, each bearing interest at eight per cent from date; and the trial upon the general issue resulted in a verdict for plaintiff for \$451.39, which he moved to have set aside, and failing therein, took this appeal from the judgment rendered.

The deceased died August 30, 1891, at the age of eighty-three years. For eighteen years she had been an invalid, and for the last ten, in very feeble health. She could read print but never learned to write or to read writing. From a time some years before the making of these notes until the spring of 1886 she lived with Hattie Beaty, her only child, who acted for her in all matters of her business and to whom by her will she bequeathed the sum of \$2,000, leaving the residue of her estate, if any, to her seven step-children in equal shares. From the time last mentioned until her death she made her home with Mrs. Boynton, one of these step-children, who gave her all the care and attention that the infirmities of her health and age required.

Hattie was away from Jerseyville from the fall of 1886, until the following spring. Before going she gave Mrs. Boynton \$55 of her mother's money, and also left with her, for safe keeping, the notes here sued on, which were returned when she came back. She delivered them to appellant upon his appointment as administrator, and he testified that

they constituted all the assets of which he ever had any knowledge. When produced on the trial there was no indorsement of any payment or credit on either of them.

When they were made appellee was, and for years afterward continued to be, a banker at Mansfield. He was a step-son of the deceased, brother of Mrs. Boynton and half-brother of Hattie, and administrator of his and their father's estate. It was expressly agreed on the trial that he might be a general witness on his own behalf, notwithstanding the character in which appellant sued. He did testify that when the last of these notes was given they represented all that was due the deceased from that estate, and that he was not then nor ever since indebted to her in any character for any further amount. He produced and identified thirty-one drafts on Chicago, drawn by himself, ranging in date from October 5, 1883, to August 28, 1891, for sums of \$50 and \$100 (excepting two, for \$25 and \$75, respectively), of which thirteen were in favor of Mrs. Boynton, and the others, excepting the one for \$25, of Hattie, and each indorsed by the payee. They all amounted to \$1,875, of which Mrs. Boynton received \$850. He testified that they were all to be credited on the notes in suit. That they were all intended by him and received by the payees for account of the deceased is not questioned, nor is the authority of Hattie to receive and direct the application of any money due or belonging to her. Appellee also produced a memorandum of the thirty-one drafts, showing the date, amount and payee of each, and testified that in the preceding fall he and Hattie went over it together, compared it with a list kept by her, and found it agreed with hers in every particular mentioned, except that it contained a note of one draft which hers did not, and did not contain notes of two which hers did; that the drafts themselves were not exhibited nor present at the time, but she then told him they were all credited on the notes in suit.

This paper was admitted in evidence, with the drafts, in connection with what she then said about them, over appellant's objection; and it is claimed that appellee was thereby allowed to make evidence for himself.

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She had held his notes as agent of the payee. He claimed to have made many payments on account of them. They were negotiable and some balance was still due on them or one of them. It was, therefore, his right to know, and her duty to inform him if she could, what credit she had given him thereon and whether she was still in possession of them. If, after repeated requests by him to produce the notes, and her failure to do so, he submitted to her for examination a memorandum of the drafts he claimed as proper credits, what she thereupon did and said in relation to it tending to show it was correct in whole or part, we think was competent evidence against her principal, the deceased, and her personal representative, the appellant. So far as she admitted it to be correct, it became as much her statement as his, and its production was necessary to give meaning and effect to her verbal admission and identify the drafts in respect to which it was made. What she thus said and did constituted one transaction—a proper business transaction fairly within the scope of her agency.

Hattie denied that she had ever seen that memorandum before and that she ever told appellee she had indorsed the drafts as credits on the notes; and stated they were applied on other indebtedness due from him to her mother for her share of her husband's estate, which indebtedness she said was between three and four thousand dollars outside of the notes in suit, but of which no further particulars were stated.

Mrs. Boynton testified that Hattie at one time told her she had used up the smaller note, which the latter denied.

It is said there was no proof that Mrs. Boynton was authorized to receive the drafts made to her order. She, herself, said she did not understand that she was the agent of the deceased. But she told Hattie that if her mother was going to remain with her she must have the right or privilege of drawing money for her use, and that she did so with Hattie's consent. This was not denied, nor was her statement that the \$850 she received was all expended for necessities for the deceased. Her authority, we think, was sufficient.

It appeared that the Christian name of Mrs. Boynton's husband was John E. and her own Maria L., and the point is urged against the allowance as credits of some of the drafts she received, that they were payable to Mrs. John L. Boynton.

This is not a question of description in a pleading, and it being beyond doubt that Mrs. John E. Boynton was the person intended, and that she received and expended the money for the deceased, such an error in the name is quite immaterial.

In rebuttal, plaintiff offered in evidence a bill in chancery filed by him as administrator, against appellee, said to be for an accounting for moneys belonging to the deceased from her husband's estate, and still pending, and also three depositions taken by the complainant in support of it; and the refusal of the court to admit them is another of the errors here assigned. But we can not consider it because the matter so offered is not preserved in the record.

So of the receipt said to have been given by Hattie to appellee on settlement of her claim against him, which both she and her attorney who drew it testified had no relation to these notes or any other claim of her mother.

No complaint is made of the instructions. We see nothing in the case but the questions of fact, whether any and what payments were made on the notes in suit. Enough of the evidence has been referred to to show that upon these there was a direct conflict. No sufficient reason appears for interference with the finding of the jury, and the judgment will be affirmed.

Village of Franklin v. John M. Stringam.

1. CITIES AND VILLAGES—*Dramshop Licenses*.—An ordinance provided that an applicant for a dramshop license should file with the clerk a bond, duly approved by the president, and should pay to the clerk the required sum in advance, whereupon the clerk should issue a certificate

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of such payment, to be signed by the president, which being delivered to the applicant should give him a right to sell. The applicant having paid his money, had a receipt signed by the clerk, but the president declined to approve his bond or to sign his certificate. *It was held*, that he had no right to sell.

Memorandum.—Action for violation of an ordinance. In the County Court of Morgan County; the Hon. O. P. THOMPSON, Judge, presiding. Declaration in debt; plea of general issue, etc.; trial by the court without a jury; finding and judgment for defendant; appeal by plaintiff. Heard in this court at the May term, 1894. Reversed and remanded. Opinion filed October 29, 1894.

C. A. BARNES and H. G. WHITLOCK, attorneys for appellant.

OSCAR A. DELEUW, attorney for appellee; F. D. McAVOY, of counsel.

MR. PRESIDING JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The Village of Franklin brought an action of debt against John M. Stringam to recover certain penalties for having sold spirituous liquors in violation of the village ordinances.

A trial by the court, a jury being waived, resulted in a judgment for defendant from which the plaintiff prosecutes this appeal.

The sale of the liquor was admitted, and the only question was whether the village was estopped to deny that the sales were authorized.

The ordinance provided that an applicant for a license should file with the clerk a bond conditioned according to the laws of the State of Illinois, duly approved by the president of the board of trustees of the village, and should pay to the clerk the required sum in advance, whereupon the clerk should issue a certificate of such payment to be signed by said president, which being delivered to the applicant should give him the right to sell, etc.

It was necessary then, first, that the license money should be paid; second, that a proper bond should be approved by the president and duly filed, and third, that a certificate should be issued signed by the president.

All the defendant had here was a receipt signed by the clerk. The president had declined to accept a bond, and had declined to sign a certificate. There is some evidence to the effect that the applicant had, by the president, been referred to the clerk, but it is clear the president not only had not approved the bond but had positively refused to do so.

It appears that defendant had formerly held a certificate or license which had expired, and that he wished to renew, but as a recent popular vote had been against further license in the village, and perhaps for other reasons, the president was unwilling to grant it, and the defendant saw fit to rely upon a mere payment to the clerk, which was, of itself, manifestly insufficient.

The defendant was bound to take notice of the requirements of the ordinance and from the facts in proof it is apparent he knew the proceeding was irregular.

It is not like the cases relied upon in the brief of the appellee. The clerk was by ordinance authorized to receive the money, but not until a bond, approved by the president, had been filed with him, and he could not bind the village by accepting money when no bond was presented. The clerk appropriated the money to his own use, but this was immaterial. If it had been paid under proper circumstances the village could not have urged that as an objection.

The ordinance was not complied with, and the sales were illegal.

The judgment must be reversed and the cause remanded.

Isaac D. Stice v. John W. Smith and John W. Stimpson.

1. *SETTLEMENTS—When Conclusive.*—Where a party, to whom an account composed of different items is owing, accepts a payment of the bill with the exception of a disputed item, with the understanding that the debtor is to be relieved of liability upon such item, such account becomes thereby settled and the adjustment is conclusive in the absence of fraud, inaccuracy, omission or mistake.

Stice v. Smith.

Memorandum.—Assumpsit. In the County Court of Morgan County; the Hon. O. P. THOMPSON, Judge, presiding. Declaration for lumber sold and delivered; pleas of general issue and statute of frauds; trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1894, reversed and remanded. Opinion filed October 29, 1894.

STATEMENT OF THE CASE.

The appellees presented to the appellant for payment, a bill for lumber sold by them to the firm of McGlothlin Bros., carpenters. The carpenters had used the lumber, etc., in constructing a house for the appellant under a contract which required them to furnish material and labor necessary to complete the building. The appellant contended that he had paid \$105 upon the bill. The appellees admitted that he had paid \$105, as a payment upon the bill, but contended that it was paid under an agreement with appellant that the appellees should pay the money for him to certain workmen, to whom McGlothlin Bros. were indebted for labor done on appellant's building, and that they did so apply the money. Appellant denied that he had so agreed, and insisted that the appellees, to induce him to pay the \$105, agreed that if the appellant would make such payment upon the lumber bill they would loan the money so paid to McGlothlin Bros. to enable them to pay their hands, and thereupon he drew a check upon a bank for the \$105, and gave it to the appellees, who, in his presence, delivered it to McGlothlin. The parties stated and re-stated to each other their respective claims, and the appellant finally announced that he would pay the balance of the lumber bill on condition that the \$105 formerly paid should be treated as a payment by him to the appellees upon such bill. The appellees thereupon accepted and the appellant paid to them \$311.50, the amount of the lumber bill less the said sum of \$105, and the appellee firm executed and delivered to the appellant a receipt in writing for that sum as in full for the lumber bill of McGlothlin Bros. As to this the appellee Smith, who acted for his firm, testified: "I gave him a receipt in full when he came to pay the lumber bill, because he would not pay any of it unless

we did. * * * We thought we had better sue for a part of it than for the whole and gave him a receipt in full." This was an action in assumpsit, brought by the appellee to recover the disputed sum of \$105, as being due then upon the lumber bill, or for money paid by them to McGlothlin Bros. under authority of the alleged agreement with the appellee. This is an appeal from a judgment rendered against the appellant in the action. The court instructed the jury in effect that, although the plaintiff had given a receipt in full, yet if the jury believed from the evidence that the appellant, when the \$105 was paid, agreed and contracted that the money so paid should be applied by the appellees in discharge of the bills due the workmen, and that the money was so applied, then the receipt in full might be disregarded by the jury, and refused the following instructions asked by the appellant:

5. If you find from the evidence that at the time the receipt in evidence, dated February 1, 1892, was given, which purports to be a receipt in full for lumber bill from plaintiffs to the defendant on the bill of McGlothlin Bros., that there was a dispute between the parties as to whether or not the defendant was liable for the further and other sum of \$105, the plaintiffs claiming that the defendant owed that sum, and the defendant denying it, and if the evidence shows that on the defendant paying all the claim of the plaintiffs except the said disputed sum of \$105, that the plaintiffs gave him a receipt in full, then they, the plaintiffs, will be bound by said receipt as to said disputed sum of \$105. And if the evidence shows that this suit is for said disputed sum of \$105, and for nothing else, then your verdict should be for the defendant.

6. If you find from the evidence that at the time of giving the receipt, dated February 1, 1892, purporting to be in full for lumber bill, that Stice would not agree to pay the \$105 in dispute in this case, and if the evidence further shows that Smith, with full knowledge of the fact that Stice refused to pay the same, accepted the balance of his claim for lumber, not disputed by Stice, gave a receipt in full, with the

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purpose of afterward suing Stice for the same, then, under such facts, Smith would be bound by such receipt, and your verdict should be for the defendant.

HERBERT G. WHITLOCK, attorney for appellant.

M. T. LAYMAN, attorney for appellees.

MR. JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

It appeared without dispute from the testimony in behalf of the appellees as well as that for the appellant that the parties hereto came together voluntarily for the purpose of endeavoring to adjust unsettled items of account between them. The claim for which this judgment was rendered was brought forward by the appellees, and all that pertained to it as a just demand in their favor was debated, and duly considered by the parties together, with all that the appellant had to urge against his liability to account to the appellees for it. Appellant finally offered to pay the sum of \$311.50 upon the basis that he be relieved of the alleged liability as to this particular item sued for. The appellees accepted the money upon that basis and can not be allowed to say that they did so with a mental reservation to the contrary. The open account previously existing became thereby settled, and the adjustment then made became conclusive in the absence of fraud, inaccuracy, omission or mistake. 1 Amer. and Eng. Ency. of Law, 109; Gage v. Parmelee, 87 Ill. 329. It was not contended that either of these grounds for opening the account existed. We think instructions Nos. 5 and 6, asked in behalf of appellant, should have been given, and those given in behalf of appellees, based upon the opposing theory, should have been refused. The judgment must, we think, be reversed and the cause remanded.

56	100
174	838

Elliott D. Jury and Jacob Sholem v. Lizzie Ogden.

1. **DEATH BY WRONGFUL ACT—*Nature of the Resulting Action.***—A right of action is not given by Section 1, Chapter 70, R. S., entitled "Injuries," to individuals for wrongs to them, respectively, as such, but to the personal representatives of the person killed, for the common benefit of those who are legally entitled to share in the distribution of his personal estate. The amount to be recovered is what the statute regards as the pecuniary value of the addition to such estate left, as the deceased, in reasonable probability, would have made to it and left, if his death had not been wrongfully caused.

2. **SAME—*Measure of Damages.***—The amount of the recovery is to be estimated by the jury from all the facts and circumstances found concerning the deceased, his prospect of life, his means, opportunities, ability and habits with reference to the making and saving of money or money's worth; in other words, such pecuniary damages, not exceeding the sum of \$5,000, as he would have sustained if death had not ensued, excepting those that would be punitive to the defendant or exclusively personal to himself, such as pain and suffering.

3. **SAME—*When the Cause of Action Arises.***—The claim of the beneficiaries has no existence previous to or at the time of death. It arises upon that event, and solely from their relation to the deceased, as surviving widow or next of kin.

4. **SAME—*Legal Claims Only Recognized.***—No other relative than the widow and next of kin is mentioned in the statute as a possible foundation for the action. A legal claim to his support, or the fact of actual support at the time of death, in no way affects it. A legal right of the beneficiary to support from the deceased, existing before and at the time of his death, is not essential to the right of recovery for his or her benefit under Chapter 70, R. S., entitled Injuries.

5. **THE DRAMSHOP ACT—*Nature of Actions Under.***—The provisions of Chapter 43, R. S., entitled Dramshops, are materially different in their bearings upon questions of support, etc., from Chapter 70, R. S., entitled Injuries. Under the former, every husband, wife, child, parent, guardian, employer or other person, injured in person or property by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, is given an action against persons who, by selling or giving intoxicating liquors, have, in whole or in part, caused such intoxication.

6. **SAME—*Damages Under, Not Limited—Conditions of the Remedy.***—By the dramshop act the right of recovery is not confined to actual damages nor limited in amount, nor is it conditioned upon the death of the person whose intoxication is caused, nor upon his right to recover if he survived, nor upon the existence of any such relation to him as would entitle the claimant to share in the distribution of his personal estate.

7. **SAME—*The Remedy—To Whom Given—Damages.***—Under the dram-

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shop act the remedy is given to any party in his individual right who, by such intoxication, is injured in person, property or by means of support for the amount of his actual, and in a proper case exemplary, damages.

8. *SAME—Nature of the Injury.*—The injury in person or property mentioned in the dramshop act is an injury to, or in violation of a legal right, in actual enjoyment before and at the time of the injury thereto.

9. *SAME—Injury to Means of Support.*—The means of support referred to in the dramshop act are such as the person intoxicated is under a legal obligation to furnish, and enjoyed by the person injured under an enforceable legal right, and not such as are enjoyed by the mere grace and favor of the person who is the subject of intoxication.

Memorandum.—Action under the dramshop act. In the Circuit Court of Edgar County; the Hon. EDWARD P. VAIL, Judge, presiding. Trial by jury; verdict and judgment for plaintiff; error by defendants. Heard in this court at the May term, 1894. Reversed and remanded. Opinion filed October 29, 1894.

Copy of instruction referred to in the opinion:

The jury are instructed that if they find from a preponderance of the evidence in this case that the plaintiff, Lizzie Ogden, was over age and was living with her father, Jonathan Ogden, as a member of his family the same as before her majority, and so continued to live with him until about May, 1893, and that while she so lived with him, he, the said Jonathan Ogden, contributed to her support, and if you further find from a preponderance of the evidence that about May, 1893, the said Lizzie Ogden was compelled to, and did, leave her father's home in consequence of the habitual intoxication of her said father, and that such intoxication was produced by intoxicating liquors sold or given to the said Jonathan Ogden by the said defendant, Elliott D. Jury, as alleged in the plaintiff's declaration, and that if you further find that her said father, from May, 1893, up to the time of bringing this suit, by reason of such intoxication produced as aforesaid, failed or refused to support her, then the jury are authorized to find that the plaintiff has been thereby injured in her means of support, and the fact that the said Lizzie Ogden is above the age of eighteen years can make no difference in such state of the proof.

SELLAR & TANNER, attorneys for appellant Jury, and
JAMES A. EADS, attorney for appellant Sholem.

J. W. HOWELL and S. I. HEADLEY, attorneys for appellee.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

This action was commenced by appellee on August 21, 1893, under the dramshop act, against the keeper of a

liquor saloon, and the owner of the premises who leased them for that purpose, for alleged injury in her person and means of support caused by the intoxication of her father produced by liquor sold to him by said keeper. She obtained a judgment for \$1,200, which the defendants by the writ of error, here prosecuted, seek to reverse.

It was shown that when she brought the action she was about twenty-five years of age, unmarried, and had lived with her father upon his farm of three hundred and forty acres, as a member of his family, from her birth until May, 1893, when she finally left, and has since received from him no support whatever. She was in no sense a pauper, nor was there any contract between them binding him to support her; but the proof is ample that when sober he was to her what a father should be, and there appears no reason to doubt that but for his intoxication she would have remained with and been supported by him so long as they lived and she was unmarried. From July, 1892, until she left, appellant Jury kept a saloon under a written lease for that purpose from his co-appellant. Throughout that period Ogden was his constant patron, and in immediate consequence of intoxication caused by liquor he purchased there, by brutal personal violence and threats, the particulars of which need not be stated, compelled her, for safety, to leave her home as she did. His wife left him in January 1893, and obtained a divorce for like cause. The evidence tends to show, and we think does show, that Jury was personally served by appellee with notice in writing from her mother, and verbally requested by her brother, not to sell intoxicating liquor to him, but persisted in so doing, declaring that he would sell to whom he pleased.

Had appellee confined her claim to damages for injury to her person, the evidence would have justified a larger judgment. But the court instructed the jury, upon the hypothesis of the facts above stated, that they would be authorized to find that the plaintiff had been injured in her means of support, notwithstanding her age, and since it is not improbable that something was allowed by the jury for such

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injury under that instruction, if it was error, the verdict was to that extent against the law, and should, therefore, have been set aside.

It is insisted for appellants that because of her age she had no legal claim for support from her father, and hence that his failure or refusal to give it, from whatever cause, could not have been an "injury" in the view of the law. On behalf of appellee it is claimed that any loss or diminution of the means of support actually received, though not of legal right, caused as stated in the statute, is a sufficient ground for recovery under it. This is the only question in the case, and although of considerable importance, no authority directly in point upon it has been found.

For appellee counsel cite *Railroad Company v. Barron*, 5 Wall. (U. S.) 72-90, in which it is held that to maintain the action given by Chap. 70 of the Revised Statutes it was unnecessary to show a legal right in the beneficiaries to support from the deceased, as authority, from its analogy to the case at bar.

Section 1 of that act provides that "whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured;" and section 2 provides that "every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate, and in every such action the jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries

resulting from such death to the wife and next of kin of such deceased person, not exceeding the sum of \$5,000."

A right of action is not by this statute given to individuals for wrongs to them, respectively, as such, but to the personal representative of the person killed, for the common benefit of those who are legally entitled to share in the distribution of his personal estate. The amount to be recovered is what the statute regards as the pecuniary value of the addition to such estate left as the deceased, in reasonable probability, would have made to it and left, if his death had not been so wrongfully caused. It is to be estimated by the jury from all the facts and circumstances proved, his prospect of life and his means, opportunities, ability and habits, with reference to the making and saving of money or money's worth; in other words, such pecuniary damages as he would have sustained if death had not ensued, excepting those that would be punitive to the defendant or exclusively personal to himself, as for pain and suffering, but not exceeding the sum of \$5,000. The claim of the beneficiaries has no existence previous to or at the time of his death. It arises upon that event and solely from their relation to him as surviving widow or next of kin. No other relation is mentioned in the statute as a possible foundation for it. A legal claim to his support or the fact of actual support at the time of his death in no way affects it. Of three children one may be legally entitled to be and actually being supported by him, another so entitled to support but not actually receiving it, and the third, neither receiving nor legally entitled to receive it; and yet, being next of kin in the same degree, they would share alike in the distribution of the damages recovered in an action under this statute.

Such seems to be the construction given to it by the *Baron* case, *supra*, and the other Illinois cases therein referred to, which are all that are cited in the argument for appellee, and which appears to us to be obviously well grounded in the language of the act; and it necessarily follows therefrom that a legal right of the beneficiary to support from the deceased, existing before and at the time of his death, is

not essential to the right of recovery for his or her benefit in an action under that statute.

But we are of opinion that the provision of the dram-shop act (R. S., Ch. 43, Sec. 9) under which this action was brought, is materially different in its bearing upon the question here under consideration. It is as follows:

“Every husband, wife, child, parent, guardian, employer or other person, who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving intoxicating liquors, have caused the intoxication, in whole or in part, of such person or persons; and any person owning, renting, leasing or permitting the occupation of any building or premises, and having knowledge that intoxicating liquors are to be sold therein, or who, having leased the same for other purposes, shall knowingly permit therein the sale of any intoxicating liquors that have caused, in whole or in part, the intoxication of any person, shall be liable, severally or jointly, with the person or persons selling or giving intoxicating liquors aforesaid, for all damages sustained, and for exemplary damages.”

By this act the right of recovery is not confined to actual damages nor limited in amount; nor is it conditioned upon the death of the person whose intoxication is caused as therein stated, in consequence of such intoxication, nor upon his right to recover if he survived, nor upon the existence of any such relation to him as would entitle the claimant to share in the distribution of his intestate personal estate. It is given to any party, in his or her individual right, who by such intoxication, habitual or otherwise, is injured in person, property or means of support, for the amount of his or her actual and particular damage, and in a proper case, for exemplary damages.

It is obvious that the injury in person or property mentioned in this act is an injury to or in violation of a legal

right, in actual enjoyment before and at the time of the injury thereto; and the means of support are put in the same category. The question is whether they also must be of legal right, that is, given by law, and in like actual enjoyment, to support an action for injury in respect thereof under this act, or will it suffice that they are in actual enjoyment without any claim of right thereto which might be enforced by law.

The only distinction contemplated by the question is between means of support enjoyed under an enforceable legal right and means enjoyed under mere grace and favor of the person who is the subject of intoxication; that is, without legal obligation on his part to furnish them. The probability of his continuing to furnish them without legal obligation but for such intoxication, would, in fact, depend upon other considerations, such as moral obligations, benevolence, gratitude, affection, or even the existence of immoral relations—none of which can properly be here considered. In *Good v. Towns & Sullivan*, 56 Vt. 410, which was under a statute giving a right of action to one "in any manner dependent" on a person whose death was caused by intoxicating liquor illegally furnished, and the question was whether it meant a legal or only an actual dependence, the court was of opinion that no further or other distinction could be considered; that "the law can not determine what a moral obligation is, and takes no cognizance of them;" and held that the statute must be construed to mean a legal dependence, mainly for the reason that "if it is given a greater scope than this, there would be great difficulty in administering it. There would seem to be no stopping place short of including all possible cases of actual dependency, and notwithstanding the absence of a moral obligation to support." That reason is of equal force here, and it is easy to conceive of many cases in which means of support are actually being received where it may be presumed nobody would contend that an action for their deprivation would lie under our statute; for example, where they are furnished in consideration of im-

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moral relations between the parties and in order to maintain them. Can it be supposed that for injury in means of support so received, the statute was intended to give exemplary damages?

We may add that such a construction would give rise to much difficulty in determining what should be considered means of support, and consequently, who would be in position to maintain the action. Does the act include merchants and mechanics who have lost the trade and patronage of one killed or impoverished by reason of intoxication? Where would be the limit of liability, as to parties?

For these reasons we hold that the means of support referred to in the statute are such as the person intoxicated would be legally bound to furnish. It was therefore error to give the instruction complained of, for which the judgment will be reversed and the cause remanded.

**Moses B. Condell v. Mary J. Glover, Winthrop Sud-
duth, Trustee, etc., and Emily Montgomery.**

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163 566

1. **ADVANCEMENTS—Object of the Statute.**—The object of the statute of advancements is to make provisions for all children of an ancestor equal. The intention of the act being equality founded upon equity.

2. **SAME—Presumption in Favor of Equality—Hotchpot.**—The law ascribes to a donor of advancements an intention to treat all children alike in the absence of a contrary intent, and if a child is not content, he must bring his advancements into hotchpot, that is, return to the estate what he has before received, before he can receive more.

3. **TESTATE ESTATES—Duty of Executors.**—When the claims of creditors and the costs of the proceedings attending the settlement of a testate estate in the Probate Court have been paid and the time the law requires the estate to be kept open has expired, it is the duty of the executor to settle the estate and dispose of the assets according to the directions of the will.

4. **SAME—When Regarded as Settled.**—After the debts and costs of settling a testate estate have been paid, the legacies should be liquidated and the assets of the estate, if any, devoted to the creation of trust funds lodged in the custody of the trustee, according to the require-

ments of the will. This done, the estate is to be regarded as settled and no longer existing.

5. **TESTAMENTARY TRUSTS**—*May Continue After the Settlement of the Estate.*—When a trust is created by a will it must necessarily continue, if so provided, after the settlement of the estate, and the trustee must look to the will in such cases for direction and instruction in the management and disposition of the trust fund; but it does not follow that the estate of the testator must remain unsettled until the fund has served the purposes of its creation or been exhausted.

6. **EXECUTORS**—*May Serve in a Double Capacity.*—Executors may serve in a double capacity, one of executorship pure and simple, the other that of trustee. When the duties of the first capacity are discharged it is to be considered that the estate is settled and closed, though the trusts remain in full force to be administered as in other cases according to the provisions of the will creating them.

7. **TRUST FUNDS**—*When No Longer a Part of the Estate.*—When the assets of an estate have been, under the provisions of a will, transferred from the custody of the executor to that of the trustee, whether he be the same or another person, such assets constitute a trust fund and are no longer a part of the estate.

8. **HOTCHPOT**—*Not to Defeat a Trust Fund.*—The rule as to bringing advancements into hotchpot can not defeat the execution of a trust created under the provisions of a will.

9. **SAME**—*Not to Defeat the Intention of a Testator.*—The maxim that equality is equity and means shares equalized by deducting advancements, and the rule that advancements shall be brought into hotchpot, have no application against the manifest intention of a testator to the contrary.

10. **WILLS**—*The Law Will Execute.*—Where the validity of a will is unquestioned the law will execute its directions without regard to the reasons that may have influenced the testator.

Memorandum.—In equity. In the Circuit Court of Adams County; the Hon. OSCAR P. BONNEY, Judge, presiding. Appeal from a decree construing a will. Heard in this court at the May term, 1894. Reversed and remanded with directions. Opinion filed October 29, 1894.

STATEMENT OF THE CASE.

On the 23d day of December, 1865, Thomas Condell executed a will, the provisions whereof important for the purposes of this cause are as follows:

"3. Out of the first proceeds of my estate my executors are to pay to my wife, Elizabeth H. Condell, such an amount as will, with the amount charged to her in the account

Condell v. Glover.

attached to this will, make up the sum of five thousand dollars, to be at her absolute disposal.

4. All the remainder of the proceeds of my estate, including cash on hand, debts due to me, stocks or bonds, to which shall be added all the advances I have heretofore made to each one of my children, or shall hereafter make from time to time, as the same are or hereafter may be charged and set forth in the account attached to this will, which account will be charged in my own handwriting, and the sum of my estate then on hand, composed of all advances made to my children, debts due to me by my children for money loaned them, debts due to me by other persons, stocks, bonds, etc. (except the specific sum devised to my wife), shall then be divided into six equal parts; one part for the use of my wife, and one part for the use of each of my children, Moses B. Condell, Mary Jane Glover, Thomas E. Condell, Emily Montgomery and Albert B. Condell, to be disposed of as hereinafter directed.

5. The sixth part devised to my wife is to be held in trust by my executors hereinafter named, and invested in stocks or loaned out at interest, with good security, during the lifetime of my wife, and the interest or dividends thereof are to be paid to my wife as they may accrue and are received, for her own use during her natural life, and at her death the same is to be held in trust by my executors as trustees, to be invested in stocks or loaned out at interest with good security, and the interest or dividends is to be divided amongst my children in such sums to each and in such manner as she, my wife, may direct by will, as she may think their circumstances may require; and if my wife should not make a will, then my executors, as trustees, shall hold the same in trust and pay the interest or dividends derived therefrom to my children in such proportions as their circumstances may require to keep them from want or to furnish them the necessaries of life for themselves and children.

6. The parts devised for the use of each one of my children is to be made up of the amounts charged in the account kept, and to be kept, as aforesaid, against each one of them, and such sum of money, or notes, or stocks, as will make

the one-sixth part as aforesaid, and so much is to be paid at once to Moses B. Condell as will, with the advances charged to him, amount to one-half of his sixth part, as aforesaid, and the other half of the sixth part devised to him is to be held by my executors as trustees, and in trust for him, and is to be loaned out on good security or kept invested in stocks and the interest or dividends is to be paid over to him as the same accrues and is received during his natural life, and after his death the principal of his share or part is to be paid over to his heirs.

7. And so much is to be paid over at once to Mary Jane Glover as will, with the advances charged to her, amount to one-third of her sixth part as aforesaid, and the other two-thirds of her sixth part as devised to her is to be held by my executors as trustees and in trust for her, and is to be loaned out on good security or kept invested in stocks and the interest or dividends is to be paid over to her as the same accrues and is received during her natural life, and after her death the principal of her share or part is to be paid over to her heirs.

8. And so much is to be paid at once to Thomas E. Condell as will, with the advances charged to him, amount to one-third of his sixth part as aforesaid, and the other two-thirds of his sixth part devised to him is to be held by my executors as trustees, and in trust for him, and is to be loaned out on good security or kept invested in stocks and the interest or dividends is to be paid over to him as the same accrues and is received during his natural life, and after his death the principal of his share or part is to be paid over to his heirs.

9. And so much is to be paid at once to Emily Montgomery, as will, with the advances charged to her, amount to one-third of her sixth part as aforesaid and the other two-thirds of the sixth part devised to her is to be held by my executors as trustees and in trust for her, and is to be loaned out on good security or kept invested in stocks, and the interest or dividends is to be paid over to her as the same accrues and is to receive during her natural life, and after her death the principal of her part or share is to be paid over to her heirs.

10. The part devised to my son, Albert B. Condell, is to be kept by my executors entire at interest or invested until he shall arrive at legal age, and so much of the interest or dividends as may be necessary to his support and to give him a good education, shall be applied to that purpose by my executors, and when he shall arrive at lawful age, he is to receive one-third of his sixth part and the other two-thirds of the sixth part devised to him is to be held by my executors as trustees and in trust for him and is to be loaned out on good security or kept invested in stocks and the interest or dividends is to be paid to him as the same accrues and is received during his natural life, and after his death the principal of his share or part is to be paid to his heirs.

11. If, by misfortune, affliction or otherwise any of my children should not make a proper use of the income to be derived from their trust fund, my executors and trustees are hereby directed and authorized to use said income, in such a manner as will insure to them the necessities of life and keep them from want. In the event of the death of any of my children without living heirs of their body their share of my estate shall be added to the sum held in trust for the benefit of my wife, Elizabeth H. Condell, during her natural life, and after her death the same shall be divided amongst my children in the same manner as is provided for the distribution of her share."

Afterward, on the 19th day of August, 1867, said Thomas Condell executed a codicil to his will, the provision whereof material for consideration being as follows: "If, in the settlement of my estate according to the provisions of the foregoing will, it should appear that the amount advanced and loaned my son, Moses B. Condell, should exceed his share of my estate, then his share shall be what he has already received, and his notes shall be canceled and delivered to him." Elizabeth Condell, wife of Thomas, died December 6, 1876, and Thomas survived her about four years, and then departed this life October 11, 1880, leaving this will and codicil his last will and testament. John M.

Glover became sole executor of the estate. It appeared that the testator during his lifetime made advancements to Moses B. Condell, the appellant, in excess of the one-sixth part of the estate bequeathed to him.

Advancements and loans made to Thomas E. Condell also exceeded his one-sixth part. The other devisees, Mary J. Glover, Emily Montgomery and Albert E. Condell, upon the theory that the estate under the will was to be divided equally between them, entered into an agreement in writing, duly acknowledged, purporting to convey the entire estate to Mary J. Glover, and providing for the payment by her to said Emily and Albert B., of certain other sums, to be held by such trustee for said Emily and Albert, under the provisions of the will in respect of each of them. This agreement resulted in the transfer of the assets of the estate to Mary J. Glover, and she paid to the executor the sum of \$14,000 for Emily and the like sum for Albert B., to be held by him for them under the provisions of the will. Moses B. Condell and wife executed and delivered to Mary J. Glover the following instrument:

This indenture, signed, sealed and delivered by Moses B. Condell and Helen M. Condell, his wife, of Sangamon County, Illinois, to Mary J. Glover, of LaGrange, Missouri, witnesses: that the said Moses B. Condell and wife, in consideration of \$829.35, paid to the Marine and Fire Insurance Company, of Springfield, Illinois, the receipt whereof is hereby acknowledged, do hereby give, grant, quit-claim and release to the said Mary J. Glover, all their claim, right, title and interest in and to the estate of the late Thomas Condell and of the late Elizabeth H. Condell, lands, real estate and personalty wherever situated, to have and to hold to her sole, separate and exclusive use and to her heirs forever.

In testimony whereof we have hereunto set our hands and seals this 14th day of March, 1883.

M. B. CONDELL, [SEAL.]

H. M. CONDELL. [SEAL.]

Certificate of acknowledgment to above release.

The executor made his final report as executor, April 6,

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1883, which was approved, and he was not formally discharged, as he still held, as trustee, under the will, the funds received from Mary J. Glover for Emily Montgomery and Albert B. Condell, under the contract between them before mentioned. John M. Glover, trustee, died November 11, 1891, and Winthrop Sudduth, one of the defendants in error, was, by the court, duly appointed successor to Glover as trustee under said will, and as such he received the funds held for Albert B. and Emily. Albert B. Condell died October 30, 1892, leaving no widow, child or descendants of a child. On the 13th day of February, 1893, Mary J. Glover, Emily Montgomery and Winthrop Sudduth, as trustee, filed a bill in chancery in the Circuit Court of Adams County, in which they recited the facts heretofore set out and many others not material to be here considered, and averred and claimed that Moses B. Condell and Thomas Condell, by virtue of the advancement made to them by their father, and the releases executed by them to Mary J. Glover, had now no interest, direct or contingent, of the fund created under the provisions of the will in behalf of Albert B., now held by Sudduth, as successor in trust to the executor named in the will, and prayed construction of the will to that effect. The court, upon a hearing, declared and decreed the two sums of \$14,000 held by Sudduth as trustee, respectively for Emily E. Montgomery and Albert B. Condell, were and are parts of the testator's estate, and that Moses B. Condell and Thomas E. Condell having received by way of advancements amounts in excess of the one-sixth share each, of the testator's estate, had no interest or right whatever in the fund accruing to Albert B. under the will, but that all interest and right in such trust fund vested in Mary J. Glover and Emily Montgomery, to whom the court decreed the trustees should pay and disburse such fund in accordance with the provisions of the will. Moses B. Condell prosecuted this appeal from the decree.

CARTER, GOVERT & PAPE, and PATTON, HAMILTON & PATTON, attorneys for appellant.

CARL E. EPLER, attorney for appellees.

MR. JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

Albert died, leaving surviving him neither wife, child, children or descendants thereof; that is, without leaving heirs of his body within the meaning of those words as employed in the will. The parties hereto unite in the view that the fund held for him by Sudduth, as trustee, did not descend as intestate property to the heirs and legal representatives of Albert under the Statute of Descents, but that it fell under the operation of the eleventh clause of the will, which provides that in such an event the fund should be added to a fund provided for Elizabeth H. Condell, wife of the testator, by the fifth clause of will. Elizabeth H., the wife, died before the testator, and no fund in her favor ever existed to which the fund created for the benefit of Albert could be added. We, however, agree with the parties hereto that the will operates to control the disposition of the fund held for Albert.

Then, by the effect and operation of the eleventh clause of the will, it became a trust fund, to be administered in accordance with the provisions of the fifth clause of the will, which are in that respect, as follows: "My executors, as trustees, shall hold the same in trust, and pay the interest or dividends derived therefrom to my children, in such proportions as their circumstances may require to keep them from want or to furnish them the necessities of life for themselves and children."

The appellant being one of the children of the testator, and there being no proof or allegation that any of the children are in want, or need to be furnished with the necessities of life, unless reason appear to prevent the operation of this clause, must be regarded as one of the beneficiaries of this fund. Appellee insists that two good and sufficient reasons exist: First, that as the advancements and loans made to appellant by his father exceeded his one-sixth part or share of the estate, he can not have more from this estate without first

bringing into hotchpot what he has received; second, that appellant, by his solemn agreement, divested himself of and invested Mary J. Glover with all his rights in the fund. In support of the first reason or proposition, it is urged that the fund is still part of the estate of Thomas Condell, deceased; that under the will, the loans made to the appellant by the testator are to be considered as advancements; that the statute as to advancements was to make provision for all children equal—the intention of the act being equality, founded upon equity; that the law ascribes to donors of advancements an intention to treat children equally in the absence of a contrary intent, and if a child be advanced and be not content, but would receive more, he must bring into hotchpot what he has before received, to effect equality and equity.

We do not, however, agree that the fund constituted a part of the assets of the estate of the deceased testator. We think that when the claims of creditors and the costs attending the proceedings in the estate in the Probate Court had been met and discharged and the time the law requires the estate to be kept open had expired, that it became the duty of the executor to settle the estate and dispose of the assets according to the directions of the will. Then the amount of the legacies to the children of the deceased should have been ascertained and the net assets of the estate devoted to the creation of a fund for each of them found entitled thereto, and such fund lodged in the custody of a trustee, as the will required. This done, the estate ought to have been regarded as settled or closed, and no longer existing. True, the trusts continue, and the executor or trustee must look to the will for guidance in the administration thereof. It is not uncommon to raise a trust by will and devote funds through the medium of trustees to the furtherance of specified purposes; and though such trustees must look to the will in such cases for direction and instruction in the management and disposition of the trust fund, yet it has never been held or deemed to follow that the estate of the donor must remain unsettled until the fund has served the purposes of its creation

or been exhausted. Executors may serve in a double capacity, one of executorship pure and simple, the other that of trustee, or a testator may devolve the trust duties and powers upon another than the executor. When the duties of the first capacity are discharged, it is to be considered that the estate is settled and closed, though the trusts remain in full force to be administered as in other cases, according to the provisions of the instrument by which they are created, and by the person appointed trustee, whether he be the executor or another. When assets of the estate have been under the provisions of the will transferred from the custody of the executor to that of the trustee, whether he be the same or another person, such assets constitute a trust fund and are no longer part of the estate. Therefore, when the property of this estate was converted into the two trust funds—one for Albert and the other for Emily Montgomery—it ceased to be of the assets of the estate. Hence, upon the death of Albert, the fund held for him did not constitute a part of the estate, but was still a trust fund to be disposed under the provisions of the instrument by which the trust was created, which in this instance is the will. The rule as to bringing advancements into “hotchpot” can have no application to defeat the execution of such a trust.

The maxim that equality is equity and means shares equalized by deducting advancements, and the rule that advancements shall be brought into hotchpot, has, moreover, no application against the manifest intention of the testator to the contrary, and here we think a contrary intention is manifested. When the testator executed his will in 1865, it is clear that he understood that the amount to be charged to Moses B., the appellant, would not amount to one-half the part or share in the estate bequeathed to him, because the testator provided in the sixth clause of his will that Moses B. should be paid so much as would, with the amounts charged to him, amount to one-half of the sixth part of the estate willed to him. Afterward, the testator deemed it necessary to execute a codicil to his will. It contained two clauses, one relating to the share of his estate provided for

Moses B. by the original will, and the other to the share of Thomas E. As to Moses B., the codicil directs that if, in the settlement of the estate, it should appear that the amount loaned and advanced to Moses B. should exceed his share of the estate, then his share shall be what he has received, and his notes shall be canceled and given up to him. Manifestly the testator had, during the time intervening between the execution of the will and the codicil, made advancements or loans, or both, to Moses B., to such an extent that it seemed probable to him that the total amount thereof would exceed a one-sixth part of the estate, and that he executed the codicil to make it clear that he did not intend that Moses B. should be held liable to repay such loans or advancements, and to provide all notes given by Moses B. in excess of his share should be canceled and delivered up to him. It is perfectly clear that the testator intended that loans or advancements to Moses B. in excess of the amount his other children would receive, should be deemed absolute gifts. It can not be contended that the testator intended that his children should at all events share alike in his estate. He may have had reasons of which we know nothing for favoring Moses, or he may have been disposed to favor him capriciously and without reason. It is not contended that he was incapable of making a will or that he was unduly influenced, nor is the validity of the will questioned; hence the law will execute the directions of the will without regard to the reasons that influenced the maker.

We hold that the fund in question does not constitute a part of the estate of Thomas Condell and that Moses B. is not deprived of his interest and right in it because he did not bring his advancements and loans into hotchpot. The release or conveyance executed by Moses B. Condell and wife relied upon to effect a transfer of all interest in question to Mary J. Glover was executed in 1883. It purports only to affect "the right, claim, title and interest of Moses and wife in the estate, lands, real estate and personalty of Thomas and Elizabeth Condell." It was executed three years before the death of Albert, and there is nothing upon

the face of the instrument, nor do we find anything otherwise in the record, tending to show that a transfer of the contingent interest of Moses in the fund held by the trustee for the use of Albert, was in the contemplation of the parties. Before its execution Mary J. Glover, Emily Montgomery and Albert B. Condell were contending that Moses and Thomas E. had each received from their father by way of loans and advancements, an amount in excess of his share of the estate, and consequently, that neither were entitled to any part of the estate, but the entire assets of the estate belonged to them. Acting upon this Mary J. Glover, Emily Montgomery and Albert entered into a contract by the terms whereof the entire property of the deceased was to become the property of Mary J. Glover to be devoted by her, so far as necessary, to the creation of two funds to be held in trust, one for Emily and the other for Albert, as required by the will of Thomas Condell, deceased. In pursuance of the contract the lands belonging to the deceased were sold by the executor at the request of Mary J. Glover and the proceeds delivered to her, and she also invested with the ownership of the other assets of the estate. It had not then been judicially determined, and Moses was then denying that his advances and loans exceeded his one-sixth part of the estate. The conveyance or release was, as we think, desired by Mary J. Glover and executed by Moses B. to settle this controversy in order to warrant and obtain the approval by the court of a final report of the executor showing disposition by the executor of assets of the estate in accordance with the agreement between Mary Glover, Mrs. Montgomery and Albert. A like release was taken from Thomas E. Condell for the like purpose, as we think, and the two releases and the agreement between the other legatees under the will seem to have been accepted by the County Court as affecting the transfer of the assets of the estate to Mary J. Glover, and the final report of the executor framed upon that basis was approved accordingly. However this may be, the release executed by Moses B. and wife did not purport to, and, in our view, did not affect his con-

tingent interest in the fund which the will required should be raised for the use of Albert. The validity of the transfer of the assets of the estate to Mary J. Glover under the agreement between her and Emily Montgomery and Albert can not be questioned by Moses B., for the reason that he executed a like agreement and, moreover, has acquiesced in the transaction for such length of time that it would be highly inequitable to permit him to object now.

The decree of the Circuit Court must be reversed so far as it decrees that the two trust funds of \$14,000 each, provided for by the will of Thomas Condell, deceased, and created thereunder by the operation of the agreement between Mary J. Glover, Emily Montgomery and Albert Condell, and now in the custody of Winthrop Sudduth, as successor in trust to the trustee named by said will, are to be deemed part of the estate of said Thomas Condell, deceased, and also in so far as it declares that Moses B. Condell has no right, title or interest in or to the principal of, or interest accruing upon the said funds of \$14,000, or either of them, and in so far as it declares that upon the death of Albert B. Condell said Mary J. Glover and Emily Montgomery took and each became entitled to one-half of the income or interest accruing upon the fund of \$14,000 held by said trustee for the use of Albert, and also so far as it directs the trustee to administer the fund upon the theory that said Mary and Emily Montgomery are the only beneficiaries thereof. The cause will be remanded with directions to the chancellor to declare by a decree to be entered in the cause that the fund created by the will in favor of Albert B. Condell and upon which he was entitled to receive the interest accruing during his lifetime, upon the death of said Albert B., constituted a trust fund to be held by a trustee acting under the provisions of the will of Thomas Condell, deceased, and to decree that such fund shall be administered as follows: Such trustee shall invest the fund in stocks or cause it to be loaned out at interest with good security and shall pay the interest or dividends derived therefrom to Mary J. Glover, Emily Montgomery, Moses B. Condell and

Thomas E. Condell in equal parts, unless a greater proportion shall be required to be paid to some one of them to keep them from want or to furnish them with the necessities of life for themselves or children, in which event said trustee shall apply to a court sitting in chancery for specific directions as to his duties. Reversed and remanded with directions.

56 120
159a 155

56 120
209a 162

John G. Strodtman, for use of Illinois Trust & Savings Bank, v. The County of Menard.

1. **COUNTIES—Void Warrants.**—Warrants drawn upon a county treasurer payable on demand are void if drawn against an empty treasury. (Sec. 1, Chap. 146 A, R. S.)

2. **SAME—Not Organized for Commercial Business.**—A county is a political division of the State organized for governmental and not commercial business; it has only such powers as are expressly conferred upon it by the statutes and the constitution of the State and such other powers as are incidental and necessary to the performance of some duty enjoined upon it by law.

3. **SAME—Power to Borrow Money.**—Power to borrow money is not an incident to local political government, and upon principle, a county can not do so in the absence of express authority of law.

4. **SAME—Power to Raise Money.**—A county has express power to raise money for legitimate expenditures by annual levies of taxes (Sec. 25, Chap 34, R. S.), and may be authorized by an affirmative vote of the people to borrow money. (Sec. 40, Chap. 34, R. S.)

5. **SAME—Without Money in the Treasury.**—Without money in its treasury a county can, in general, issue no warrant; but if it has levies of taxes made and in course of collection, it may, under Sec. 2, Chap. 146 A, R. S., discharge claims against it for matters of ordinary and necessary expenses by drawing warrants against such levies and to be paid out of such taxes when collected.

6. **SAME—Invalid Warrants as Evidence.**—A county warrant, though invalid within itself, may, if issued in settlement of a lawful demand against the county, be received in evidence in support of the action to recover upon the original demand; but not so when the warrant is, in fact, issued as an obligation for the payment of money borrowed by the county board without lawful authority.

7. **SAME—Not Liable for Money Borrowed by the County Board.**—To hold a county liable to account for money borrowed by the county board

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would be totally subversive of the statute, which prohibits the borrowing of money by the county board unless authorized to do so by the electors.

8. *SAME—Money Illegally Borrowed—Remedy in Equity.*—If money illegally borrowed by a county board is appropriated by the board to the payment of lawful demands against the county, perhaps a court of equity might provide relief and decree that the complainant, upon some equitable doctrine akin to that of subrogation, succeed to the right of the persons whose lawful claims against the county have been discharged out of his money. But money illegally borrowed can not be recovered in an action at law.

Memorandum.—Assumpsit. In the Circuit Court of Menard County; the Hon. CYRUS EPLER, Judge, presiding. Declaration; special counts on county warrants and common counts; trial by the court without a jury; finding and judgment for defendant; appeal by plaintiff. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 14, 1894.

STATEMENT OF THE CASE.

The county of Menard is not under township organization. On the 19th day of December, 1890, its board of county commissioners in regular session convened, adopted the following order:

STATE OF ILLINOIS, }
Menard County. } ss.

The Board of County Commissioners of Menard County, State of Illinois, met in regular session December 19th, A. D. 1892.

As there is no money in the treasury of Menard county, Illinois, to meet and defray the ordinary and necessary expenses of the county during the current year, it is hereby ordered by the board of county commissioners of this county that two warrants, one for the payment of three thousand (\$3,000) dollars, and one for the payment of two thousand (\$2,000) dollars, both due and payable on the first day of May, 1893, to the bearer thereof, be drawn and issued by the said county, under the hand and official seal of the clerk of said county, and countersigned by the treasurer of said county, against and in anticipation of the collection of twenty-three thousand, five hundred (\$23,500)

dollars of taxes levied by said county board on the 4th day of September, A. D. 1892, for the payment of the ordinary expenses of said county, directing said county treasurer to pay the same out of said tax levy. It is further ordered that said county treasurer set apart and hold of said taxes when collected a sufficient amount to pay said warrants when presented.

It appeared otherwise in the proof—that prior to the passage of this order the nominal plaintiff herein, J. G. Strodtman, had agreed to loan the county the sum of \$2,000; that the First National Bank of Petersburg had contracted to loan it the sum of \$3,000; and that the order above set forth was passed in order to procure such loans.

It further appeared that in pursuance of such agreement and order of the board, the county clerk of the county issued and delivered to said Strodtman the following instrument in writing or county warrant:

STATE OF ILLINOIS, }
Menard County. } ss.

Board of County Commissioners, December session, 1892.
No. c. 1303.

Treasurer of said county, pay to J. G. Strodtman or order two thousand dollars for money advanced, out of moneys in the treasury not otherwise appropriated.

Countersigned, H. R. LEVERING, County Clerk.

E. R. OELTJEN, County Treasurer.

On the 29th day of December, 1892. Strodtman borrowed \$3,000 from the beneficial plaintiff, the Illinois Trust and Savings Bank of Chicago, executed his note therefor, and as collateral security for its payment indorsed said instrument or warrant as follows:

“For value received I hereby assign the within warrant to the Illinois Trust and Savings Bank, this 29th day of December, 1892. (Signed) J. G. Strodtman.” And delivered it, so inclosed, to said Trust and Savings Bank.

The bank retained possession of Strodtman's note and the collateral intended to secure it until November, 1893, when the note and warrant were sent to the First National Bank

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of Petersburg for collection. Strodtman, who was a banker at Petersburg, failed to pay the note. Payment of the order or warrants was demanded of the county, and being refused, this, an action of assumpsit, was instituted in the name of Strodtman for the use of the bank against the county to recover the sum of money named in the order or warrant, and in the order of the county under which it was issued.

The cause was submitted to the court without a jury and judgment rendered for the county, to reverse which this appeal was taken.

BLANE & BLANE, attorneys for appellant.

APPELLEE'S BRIEF, CHARLES NUSBAUM, STATE'S ATTORNEY,
A. D. N. W. BRANSON, ATTORNEYS.

If, by law, a particular claim is to be paid out of a special fund, a warrant or order issued therefor should be made payable out of such fund; if made payable from the treasury generally by the officers issuing it, the corporation is not bound by their act. 1 Dillon, *Municipal Corporations* (3d Ed.), 505 (413); *Glidden v. Hopkins*, 47 Ill. 525.

To have the effect of making a warrant payable out of taxes levied, the warrant should be specifically drawn against the uncollected taxes of the particular year and not against the general fund or other funds in the treasury. To anticipate uncollected taxes of any fund the warrant must be specifically against and to be paid out of the taxes levied for that particular fund. *Fuller v. City of Chicago*, 89 Ill. 282.

Counties possess no powers except those specially given by law or necessary to the exercise of some so given. *County of Grundy v. Hughes*, 8 Brad. 34.

It is a familiar principle that where a statute points out a particular course to be pursued to effect a particular purpose, no other course can be lawfully pursued. *County of Hardin v. McFarlan*, 82 Ill. 138.

Municipal corporations can neither borrow money nor issue negotiable securities without express legislative sanc-

tion or irresistible implication. *Newgass v. New Orleans*, 42 La. Ann. 163, 21 Am. St. Rep. 368.

It should be remembered, also, that the express powers can be executed without holding that there is an implied power to borrow money. The revenue provisions of charters supply the county with money. And powers are not held to exist merely because they are convenient. Note 3, Sec. 118, 1 Dillon, Mun. Corp.

MR. JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

We think the court properly refused to award judgment against the county.

The warrant upon its face was payable on demand, but if considered in connection with the order of the board under which it was issued it may well be regarded as having been drawn against taxes already levied and in the course of collection, and as falling due on the 1st day of May after its date. There was no money in the treasury when it was issued.

If payable upon demand it was drawn in flagrant violation of Sec. 1, Chap. 146 A, of the statutes, and for that reason could not be made the basis of a recovery in a court of law.

Warrants against a county treasurer payable on demand are void if drawn against an empty treasury. *County of Cook v. Lowe*, 23 Ill. App. 649.

This is not only true as to the nominal plaintiff, who had full knowledge of all the facts, but is equally true as to the beneficial plaintiff, for the reason that it received the warrant when it was past due, unpaid, and therefore dishonored, and open to all defenses available as against the nominal plaintiff. We concede, however, the contention of the appellant that the warrant is to be considered in connection with the order of the county board directing it to be issued.

So considered, it is clear that the county board borrowed of the nominal plaintiff the sum of \$2,000, and gave the warrant as an obligation of the county for the repayment of that sum out of taxes then levied and to be afterward

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collected, and if this order is brought to the aid of the warrant the beneficial plaintiff must stand charged with notice of all facts disclosed in the order. The order recites that there was then no money in the treasury wherewith to defray the ordinary and necessary expenses of the county. The argument of appellant's counsel is that as there was no money in the treasury the county board was authorized by the provisions of section 2 of said chapter 146a to borrow money to meet and defray such expenses, and to draw a warrant which would constitute a legal and valid indebtedness against the county for the amount so borrowed.

As we conceive the law to be, section 2 does not confer such power.

A county is a political division of the State organized for governmental, not commercial or business purposes. It has only such powers as are expressly conferred upon it by the statutes and constitution of the State, and such other powers as are incidental and necessary to the performance of some duty enjoined upon it by law. *County of Hardin v. McFarlan*, 82 Ill. 138; *Law v. The People*, etc., 87 Ill. 385.

It has express power to raise money for legitimate expenditures by annual levies of taxes (p. 6, Sec. 25, Chap. 34, R. S.), and may be authorized by an affirmative vote of the people to borrow money. Sec. 41, Chap. 34, R. S.

Power to borrow money is not an incident to local political government, and upon principle a county can not exercise it in the absence of express authority of law so to do. *Hewitt v. School Dist.*, 94 Ill. 528; *School Directors v. Fogarty*, 76 Ill. 189; *Law v. The People*, 87 Ill. 385; *Newgass v. New Orleans*, 21 Amer. St. Rep. 368.

The statutory provision that such power may be exercised if authorized by the electors of the county is, as we think, to be regarded as excluding the right to exercise the power except when authorized by a vote of the people. *County of Hardin v. McFarlan*, *supra*.

The mode by which a county may exact from its people funds needful for lawful expenses of the county, the purpose for which said funds may be expended, and the man-

ner of its disbursement from the county treasury, are defined and regulated by statute, and as was said in *Belts v. Menard*, Breese, 395, the county is "incapable of exerting its faculties only (except) in the manner the law authorizes."

Appellant's counsel urge that the power to borrow money is to be implied as incidental to the proper discharge of the powers given and duties enjoined upon counties by Secs. 23, 24 and 25 of Chap. 34, R. S. Those sections only confer upon county authorities, whether a board of county commissioners or supervisors, power to manage and control the county funds, and transact county business according to law.

And so in effect it has been ruled by our Supreme Court. *Lock v. Davidson*, 111 Ill. 19; *Cook Co. v. McRea*, 93 Ill. 236.

Nor do we think power to borrow money is expressly, or by implication, given by the provisions of Sec. 2 of Chap. 146a.

Funds raised by the county in pursuance of law are committed by the statute to the custody of the county treasurer.

The power of the county board over such funds is to order it to be appropriated by the treasurer to the discharge of lawful demands against the county. This the board accomplishes by entering an order directing the clerk of the board to draw a warrant directing the treasurer to pay a person named therein an amount which the board has officially ascertained such person is entitled to receive out of the public moneys in satisfaction of a legitimate demand against the county.

Such warrants do not increase or create indebtedness against the county, but, upon the contrary, are intended to serve only as an official direction to the treasurer to discharge an existing indebtedness by payment thereof. In order to prevent the issuance of county warrants for other purposes, and also in pursuance of the general public policy that counties should transact their business upon a cash basis, the General Assembly, by Sec. 1, Chap. 146a, made it unlawful to issue a warrant payable on demand when the treasurer had

no money which he could lawfully apply in pursuance of the directions contained in the warrant. Sec. 2 of the same chapter was enacted in recognition of the fact that the county treasurer might at times be without funds, and the county at the same time in need of materials or articles, or of the services of persons necessary to the proper discharge of its ordinary corporate functions. It was not deemed best, however, even in such instances, to grant the county authorities any greater power than they otherwise possessed to incur indebtedness or create liabilities to be met and paid by the county, but to meet such an emergency it was provided by Sec. 2 in question, that a county, if it had no money in its treasury applicable to the payment of its "necessary and ordinary expenses," but had taxes levied therefor and in the process of collection, might, in order to meet and defray its necessary and ordinary expenses, issue a warrant not payable on demand nor against its treasury, but against and in anticipation of the taxes to be collected.

A county having money in its treasury discharges a lawful demand against it by delivering to the persons holding such demand an order or warrant authorizing and directing the county treasurer to apply the necessary sum out of the fund in his custody to the payment of the demand.

Without money in its treasury a county can, in general, issue no warrant, but if it has levies of taxes made and in course of collection, it may, under the provision of Sec. 2 in question, discharge a claim against it for some matter of ordinary and necessary expense by drawing a particular manner of warrant against such levies and to be paid out of such taxes when collected.

Neither section 1 nor section 2 gives to the county board power to create indebtedness or liabilities against a county. Each section was enacted solely to provide a mode for the payment of indebtedness, and to discharge liabilities which the board otherwise had lawful power to contract. Section 1 provides for payment by the appropriation of funds on hand, and section 2 by the appropriation of funds to come into the county treasury in the due course of law. War-

rants under the first section are authorized to issue for the payment of all legitimate county indebtedness under section 2; the warrant authorized is only to be used in discharging indebtedness incurred in this way of the ordinary and necessary expenses of the county. Neither section empowers a county to borrow money nor to issue warrants as obligation for the repayment of borrowed money.

It seems clear to us that no right of recovery can be based upon the warrant as a valid and binding instrument, evidencing an indebtedness against the county. The evidence discloses that the county received the sum of money mentioned in the warrant, and it is urged that, though the warrant is void, the plaintiff, under the evidence, should have recovered judgment under the common counts as upon an account stated, or for money had and received.

A warrant, though invalid within itself, might, if issued in settlement of a lawful demand against the county, be received in evidence, in support of an action to recover upon the original demand, but not so when the warrant was, as in the case at bar, issued as an obligation for the repayment of money borrowed by the county board without lawful authority.

To hold a county liable to account for money borrowed by the county board, would be totally subversive of the statute, which prohibits the borrowing of money by the board unless authorized so to do by the electors of the county.

To declare the doctrine in the abstract, and yet ratify its violation in practice, would operate to invest the board with the very power which the statute withholds and denies. Nor can the case for the plaintiff be maintained by force of the "general obligation to do justice," which counsel for the appellant insists "binds all persons, natural or artificial."

If the money illegally borrowed by a county board is appropriated by the board to the payment of lawful demands against the county, perhaps a court of equity might provide relief, and decree that the complainant, upon some

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equitable doctrine akin to that of subrogation, should succeed to the right of the persons whose lawful claims against the county had been discharged out of his money.

Money thus illegally loaned can not, as we think, be recovered in an action at law. The reasoning of the court in case of *Town of Hackettstown v. Snachamer*, 37 N. J. Law 181, is instructive upon this point.

In the view we have taken of this case, it did not become necessary that we should determine the contention of the appellee that the transactions between its treasurer and the nominal plaintiff established its plea of payment.

The judgment of the Circuit Court must be, and is, affirmed.

Isaac L. Morrison and Herbert G. Whitlock v. Roland Burnett.

1. **ATTORNEYS—Duty to Clients.**—An attorney is required to use such skill and prudence as lawyers of ordinary ability and care would exercise, and for failing therein, he is liable to his client for any approximate damage thereby occasioned; but he is not answerable for an error of judgment upon difficult points, nor for every mistake which may occur in practice.

Memorandum.—Action against attorneys for a failure to discharge their duties toward clients. In the Circuit Court of Sangamon County, on change of venue from Morgan County; the Hon. JACOB FOUKE, Judge, presiding. Declaration in case; plea of not guilty; trial by jury; verdict and judgment for plaintiff; appealed by defendants. Heard in this court at the May term, 1894. Reversed and remanded. Opinion filed October 29, 1894.

STATEMENT OF THE CASE.

This was an action on the case, begun in the Circuit Court of Morgan County, venue changed to Sangamon. The declaration averred that defendants were attorneys at law and copartners; that the plaintiff, on October 21, 1886, and

while defendants were following such profession, then and there retained and employed said defendants as such attorneys, for reward, to prosecute a certain suit in the "Probate" County Court of said Morgan county, at the October term thereof, 1886, and following terms, in the matter of the estate of Isham Burnett, deceased, and especially the petition of plaintiff in said suit; that plaintiff was a son of said Isham Burnett, deceased, and that defendants were employed to protect his rights and make him even in the distribution of his said father's estate, with the other children and heirs of said Isham Burnett, and to obtain plaintiff's distributive share of the estate of Isham Burnett, deceased; that said defendants accepted said retainer and entered upon said employment; that defendants not regarding their duty or their said retainer and employment, did not prosecute and attend to said suit and proceedings with due and proper care, but, on the contrary, attended to and managed said suit carelessly and unskillfully and without due and proper care; that in the distribution of said estate of Isham Burnett, deceased, the plaintiff lost and was deprived of a large part of his distributive share of his said father's estate, to wit, the sum of \$3,000, whereby plaintiff was hindered and prevented from recovering his said distributive share in his said father's estate; and also for the loss of a large sum of money, to wit, the sum of \$500, in and about prosecuting said proceedings, to the damage of the plaintiff, \$3,000. Plea, general issue.

The cause was tried by the court, a jury being waived, resulting in a finding and judgment for plaintiff for \$1,578.85, from which defendants appealed.

APPELLANTS' BRIEF, CHAS. A. BARNES, J. OTIS HUMPHREY,
AND THOS. WORTHINGTON, ATTORNEYS.

An attorney is not liable for damages when he acts honestly and to the best of his ability and with reasonable and ordinary care. Weeks on Attorneys, Sec. 290; *Watson v. Muirhead*, 57 Pa. St. 161.

An attorney is not held to extraordinary skill or care in the management of his client's business, but to such skill,

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prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise. Weeks on Attorneys, Sec. 293.

It is not every mistake or misapprehension of an attorney that will make him liable in an action for negligence. A mere error in judgment, a mistake upon a debatable point of law, or in the construction of a difficult statute, is not such negligence as renders an attorney liable to his client for loss sustained in consequence of such error or mistake. Weeks on Attorneys, Sec. 193. See, also, Shearman & Redfield on Negligence, Sec. 212, p. 257; Stevens v. Walker & Dexter, 55 Ill. 153; Gilbert v. Williams, 8 Mass. 51; Fitch v. Scott, 3 How. (Miss.) 314; Gibbons et al. v. Hoag, 95 Ill. 45; Story's Equity, Sec. 218; Chitty on Contracts (7th Am. Ed.), 555; 1 Parsons on Contracts (5th Ed.), 114, and cases cited; Watson v. Muirhead, 57 Pa. St. 161.

Mr. Weeks says: "An attorney is not liable for the consequences of a mistake in a point of law upon which a reasonable doubt may be entertained." Section 297. "An attorney is not responsible for a mistake in a doubtful point of law or of practice." 1st Parsons on Contracts (5th Ed.), p. 114, and cases cited. In Chitty on Contracts (7th Am. Ed., 555, Subdivision 4, Attorneys,) it is said, quoting an English authority: "It was not every neglect that would subject a man to such an action (for negligence); an attorney was only bound to use reasonable care and skill in managing the business of his client; if he were liable further, no man would venture to act in that capacity." Lord Ellenborough expressed his assent to this doctrine, and held that an attorney employed to purchase and prepare the assignment of an annuity (under an act of Parliament) before the decisions of the courts holding that the trusts in the annuity deeds must be set forth in the memorial, is not liable for negligence in having failed to point out to his employer that the annuity purchased was void, because the memorial omitted to specify the trusts." Citing the case of Baikie v. Chandless, 3 Camp. 19. In Compton v. Chandless, cited in the above case, it was held that any attorney who pre-

pared the memorial for an annuity, who failed to particularly set out the trusts in the annuity, whereby his client suffered loss, should not be held liable for damages. In the case of *Georfroy v. Dalton*, 4 M. & P. 149, and 6 Bing. 461, S. C., cited in *Chitty on Contracts*, p. 556, Lord Chief Justice Tindal said, among other things, "he is not answerable for error in judgment upon points of new occurrence, or of nice and doubtful construction."

APPELLEE'S BRIEF, JOHN A. BELLATTI, ATTORNEY.

If injury result to a client from attorney's want of reasonable degree of skill and care, the attorney is liable for the actual amount of damages sustained. *Watson v. Muirhead*, 5 Pa. St. 161; *Pidgeon v. Williams*, 21 Gratt. (Va.) 251; *Walpole v. Carlisle*, 32 Ind. 415; *Harter v. Morris*, 18 Ohio St. 492; *Cox v. Sullivan*, 7 Ga. 144; *Eccles v. Stephenson*, 3 Bibb (Ky.) 517; *Stephens v. Walker*, 55 Ill. 151; *Nisbet v. Lawson*, 1 Ga. 275; *Rootes v. Stone*, 2 Leigh (Tenn.) 650; *Grayson v. Wilkinson*, 5 Sm. and M. (Miss.) 268; 1 *Wait's Actions and Defenses*, 445.

The duties of an attorney to his clients are care, skill, diligence and integrity. 1 *Am. and Eng. Ency. of Law*, 958; *Weeks on Attorneys*, Sec. 259; *Lilly v. Boyd*, 72 Ga. 83.

An attorney is responsible to his client for the want of ordinary care and reasonable diligence. 1 *Am. and Eng. Ency. of Law*, 961; *Weeks on Attorneys*, Sec. 284; *Stevens v. Walker et al.*, 55 Ill. 151; *Walker et al. v. Stevens*, 79 Ill. 193; *Dearborn v. Dearborn*, 15 Mass. 316.

The question is whether the attorney exercised reasonable skill and care. *Kemp v. Bert*, 1 N. & M. 262; *Montrion v. Jeffreys*, 2 C. & P. 113; *Shillcock v. Passman*, 7 C. & P. 289; *Crosbie v. Murphy*, 8 Ir. C. L. R. 301; *Elkinton v. Holland*, 9 M. and W. 658; *Lewis v. Collard*, 23 L. J. C. P. 32.

Attorneys practicing in partnership are liable for negligence of each individual member of the firm. *Livingston v. Cox*, 6 Pa. St. 360; *Pollard v. Rawland*, 2 Blackf. (Ind.) 20; *Cummings v. Heald*, 24 Kan. 600.

MR. PRESIDING JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The specific ground of negligence relied on by the plaintiff was that the order of the County Court made upon the petition of the plaintiff and his brother Moses and their sister Charity, was so drawn as to amount to an adjudication that by the distribution of the sum of \$3,500 therein ordered among them, the petitioners were equalized with their four brothers in the distribution of the estate up to that time.

It was claimed that as a matter of fact that sum so distributed would not make them even with the other brothers and that the court did not so decide, but merely ordered that said sum, being all that was then available for distribution, should be divided between the petitioners so as to make them even with each other (they having theretofore received unequal amounts), and as far as it would go, even with the other brothers, who had received amounts equal with each other and larger than the amounts received by the petitioners, including the said sum of \$3,500, and that the defendants in drawing up the order used such terms as to import—what was not intended by the court—that the heirs were all made even by the distribution of said sum, so that when the final distribution of the estate came to be made, all the seven heirs were permitted to share equally in what was then to be divided.

The order so drawn up by defendants was approved, and signed by the county judge, and was entered as the order of the court.

According to the theory of the plaintiff this order improperly permitted the other four brothers, who were still in excess of their shares, to take equal portions with him and the other petitioners in the sum left for final distribution, whereby each of the seven received \$486.46.

The money thus received by the four amounted to \$1,945.84, of which the proportionate share of the plaintiff could not possibly have been the sum of \$1,578.85, for which he recovered judgment. It is argued, however, on his be-

half, that by the will and by the distribution made by the testator after he executed the will, and for the purpose of effecting its provisions in advance, the four brothers had received each the sum of \$9,829, and that the plaintiff and the other two were each entitled to receive enough to bring them up to that figure before the four brothers should receive any more.

Conceding this to be correct, it still appears that the sum actually received by the plaintiff lacked only a little over \$1,100 of his share, one-seventh of the estate, and that by this judgment he will receive some \$450 more than his share.

There was considerable complication growing out of advancements made to the different children by the father at various times which he intended to charge, and which were represented by notes in some instances, and by receipts in others. Some of these written evidences were lost, and when the testator made the subsequent ante-mortem division, he caused duplicates of those lost papers to be made out, which he held in lieu of the originals. After his death some of these original notes were found and were inventoried by the administrator, and thereupon each of the four brothers who had received the larger advancements, filed petitions in the County Court asking that the ante-mortem adjustment might be confirmed, and that they might receive the original notes, etc., so found.

The court granted the prayer of these petitions whereby the ante-mortem adjustment was confirmed. Later the plaintiff and his brother Moses and sister Charity filed their petition heretofore referred to, in which they asked for similar relief, and upon this petition the order was made in preparing which the alleged negligence of the defendants occurred.

The case was still further complicated by a charge made first by the father and afterward repeated and continually urged by the four brothers, that the plaintiff had abstracted the will and other papers, together with \$400 in money. This grave charge was denied by the plaintiff in his plead-

ings, but he refused to testify in regard to it, and in the end there was no evidence to sustain it. It seems pretty clear that the main effort of the plaintiff and of the defendants, acting as his attorneys, was in the first instance to clear him of this charge, and it may be that they as well as he had their attention somewhat diverted from the details of calculations in reference to the distribution of the estate.

The litigation was protracted and tedious. The report of the administrator asking for an order of final distribution came before the County Court, and the four brothers insisted that by the order made on the petition of the plaintiff and the other two, there was an adjudication that all had been made even, which view was adopted by the court, and an order was entered for a *pro rata* distribution of what remained among the seven.

From this an appeal was prosecuted by the three to the Circuit Court of Morgan County, and the cause was by change of venue afterward transferred to the Circuit Court of Sangamon County, when the judgment of the county court was confirmed. A further appeal was taken to this court, where the judgment of the Circuit Court was affirmed. On that appeal the refusal of the Circuit Court to charge plaintiff with the \$400 item was assigned as a cross-error, and the point was again pressed.

An attorney is required to use such skill and prudence as lawyers of ordinary ability and care would exercise, and for failing therein, he is liable to his client for any proximate loss thereby occasioned; but he is not answerable for an error of judgment upon nice or difficult points, nor for every mistake which may occur in practice. In the present instance it is a question whether it can be shown by merely parol evidence that the order which the county judge approved and signed was not the order he intended to make, and that it was through the negligence of the attorneys that it was so drawn. Waiving the discussion of this point, we are inclined to hold that in view of the entire case, of all that transpired in the protracted controversy, which has been briefly outlined, the evidence does not show such negli-

gence as should make the attorneys liable for the loss. We will not refer in detail to the testimony which tends to show that the plaintiff had no clear idea of what he was really entitled to and that his action misled the defendants, and that he seemed to acquiesce in what was done and made no complaint until for the first time, at the end of the controversy, which extended through five years, he was required to pay for the services of defendants and for the money they had advanced for costs in his behalf.

The supposed slip in the order of court which, though drawn by defendants, was approved by the court and objected to by no one, is all that is relied upon to support the judgment. Regarding the whole case, it would seem to hold attorneys to an extraordinary degree of care and diligence to predicate liability upon such negligence, if negligence it be. Had their attention been specially called to the expression in question, it can not fairly be said they should have anticipated it would receive such a construction as to bar the petitioners from further special participation in the estate. The judgments of the County and Circuit Courts seemed to have been affirmed in view of all the orders made in the case, and while special mention is made of this, it is but a part of the whole record. When the entire transaction is regarded, taking all the circumstances into account, we are disposed to say that the defendants ought not to be held responsible for the result. The judgment will be reversed and the cause remanded.

L. Weinberg and A. L. Weinberg, Partners, Under the Name of Weinberg Bros., v. Frank Nessel.

1. EVIDENCE—*Letters, When Not a Part of the Res Gestæ.*—When a consignor shipped goods to a consignee, and he reshipped them to Chicago, a letter written by the Chicago dealers to the consignee as to the condition of the goods, is not admissible in an action between them and the consignor, as part of the *res gestæ*.

Weinberg v. Nessel.

Memorandum.—Assumpsit. In the Circuit Court of McDonough County, on appeal from a justice of the peace; the Hon. CHARLES J. SCOFIELD, Judge, presiding. Trial by jury; verdict and judgment for plaintiffs; error by defendant. Heard in this court at the May term, 1894. Reversed and remanded. Opinion filed October 29, 1894.

Copy of letter referred to in the opinion of the court:

CHICAGO, ILL., Sept. 23, 1893.

Messrs. Weinberg Bros., Galesburg, Illinois.

GENTLEMEN: Your telegram was received this morning at 8:40 o'clock, although it bears date of 22d. However, our team, as usual, was over to the C., B. & Q. express, and got your calves direct from the express car as soon as switched. We are sorry to inform you that they were all sour and green throughout. When our man brought them we thought we would not be able to dispose of them at any price, but in the course of an hour we worked them all off as per enclosed ac. sales. If health officer had happened along he would have seized every one of them, as they were hair-slipped. You can not ship calves from your point to Chicago during such extreme warm and sultry weather as the present. You doubtless took these calves from the cooler, and being confined in a close express car all night, it is not surprising that they arrived in such condition. We are sorry for your loss on these, but when weather is cooler, so that you can ship to advantage, we hope to place your consignments at prices that will make you some money. We will keep you reliably advised upon the condition of our poultry market each day, and when you are shipping, favor us and you will find us obtaining best prices, correct weights, also remitting and returning coops daily.

Very respectfully,

HOUGH & SHERMAN.

M. J. DOUGHERTY and NEECE & SON, attorneys for plaintiff in error.

D. CHAMBERS and BAILY & HOLLY, attorneys for defendants in error.

MR. PRESIDING JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The plaintiff's claim was based upon a shipment of a quantity of veal, some nineteen hundred pounds, to the defendants, for which, as was claimed, the defendants had not fully accounted to the plaintiff. The plaintiff recovered a judgment for \$112.76, to reverse which the present writ of error has been prosecuted. One question, much in dispute, was whether the transaction was a sale or whether the shipment was on

commission. The plaintiff insisted it was a sale, and that the veal was in good condition. The defendants insisted that the veal was shipped to them on commission, and that it was found to be spoiling and unsalable at Galesburg, where they were doing business, and hoping to get rid of it, they shipped it to their commission dealers in Chicago, who sold it at greatly reduced prices.

The plaintiff claimed that even if defendants were merely acting as commission men, they were negligent in handling the veal and that the loss was on account of such negligence.

Hence, the jury were urged to find for plaintiff on one of two grounds: either that it was a sale, or, if a bailment, that the bailees did not use proper care, it being, of course, a necessary condition that the meat was sound and fit for shipment when plaintiff sent it to defendants. The evidence was sharply conflicting on all these questions. If it was a bailment and if the meat was sound when shipped it was very material to know whether it was properly handled by defendants; and as affecting this question the plaintiff was permitted against objection to read in evidence a letter written by Hough & Sherman, the commission dealers in Chicago, to the defendants. This letter was highly calculated to prejudice the defendants, and if improperly admitted in evidence, they have serious cause of complaint. It was written after the sale of the meat in Chicago; and was explanatory of the result. It is claimed that it was admissible as of the *res gestæ*, but we think not, and we know of no ground upon which it could be regarded as competent. For this error the judgment will be reversed and the cause remanded.

56	138
61	54
56	138
100	409

The People of the State of Illinois for use of Menard County v. E. R. Oeltjen et al.

1. OFFICIAL BONDS—*No Breach by Depositing Funds in a Bank.*—A county treasurer commits no breach of his official bond by depositing the public funds in a bank. He can keep the money where he chooses; if he accounts for it when legally called on, his duty is discharged.

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2. **COUNTY TREASURER—Custody of Funds by Agents—Banks.**—Where a county treasurer deposits the public money in a bank, the bank becomes his agent and the custody of the money by such bank is the custody of the treasurer. In a suit upon his official bond it is no defense by his sureties to say that the bank was unable to pay.

3. **SAME—To Deposit Moneys Where He Deems Best.**—It is the business of a county treasurer to take care of the public money, and to place it in such custody as he may deem best. All the law requires is that he have it forthcoming when legally called upon, and until he fails to do so he commits no breach of his official bond.

4. **SAME—Responsibility of Sureties upon New Bonds.**—Where a new bond is given by the county treasurer, the responsibility for public money which is in his custody, though previously deposited in a bank, and which he had not been required to pay out according to law, rests upon the new bond.

5. **SAME—Effect of a Failure to Give a New Bond.**—Where a county treasurer is required to give a new bond, under chapter 103, R. S., and fails, his official term is ended, and the sureties upon the old bond have the right to take possession of his official effects; but by the giving of the new bond the official term is continued, and the sureties upon the old bond are prevented from taking any steps to realize upon the official assets.

6. **SAME—Effect of Giving a New Bond.**—Where a county treasurer is required, under the provisions of section 10, chapter 103, R. S., to give a new bond or surrender his office, the giving of such bond and the continuance of his official tenure correspond in effect to another term with its incidents. In such case the law transfers the funds and effects on hand under the old term to the new.

7. **SAME—New Bond—Funds in Hands of Custodian.**—The effect of giving a new bond by a county treasurer under section 10, chapter 103, R. S., is to transfer balances, and if the funds are in the hands of his custodian, the matter of giving proper attention to the changing or continuing such custody arises at once, and the action done or omitted will attach to the new liability.

Memorandum.—Action on county treasurer's bond. In the Circuit Court of Menard County; the Hon. CYRUS EPLER, Judge, presiding. Declaration in debt; the pleas are stated in the opinion of the court; trial by the court without a jury; finding and judgment for defendants; appeal by plaintiff. Heard in this court at the May term, 1894. Reversed and remanded. Opinion filed October 29, 1894.

T. W. McNEELY and CHAS. NUSBAUM, attorneys for appellants.

N. W. BRANSON, attorney for appellees.

MR. PRESIDING JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This was an action of debt on the official bond of Oeltjen as treasurer of Menard county. The cause was tried by the court, a jury being waived, and judgment was for defendants, from which the county has prosecuted this appeal.

The bond in question was given in pursuance of Sec. 10, Chap. 103, R. S., the sureties on a former bond wishing to be released from further liability, having given notice under the statute for that purpose.

It bore date October 19, 1893, and was conditioned as required by law, that the principal should perform all the duties which were or might be required by law to be performed by him as treasurer of said county of Menard, in the time and manner prescribed or to be prescribed by law, and when he should be succeeded in office, should surrender and deliver over to his successor in office all books, papers, moneys and other things belonging to said county and appertaining to said office.

The breach alleged was, that, having the funds of the county in his hands amounting to the sum of, to wit, \$10,000, the said Oeltjen had refused to pay out the same upon the order of the county board, as required by law and the condition of the bond.

The pleas were *non est factum*, performance, and a third plea by the sureties that the misappropriation of the funds complained of had been committed before the giving of the bond in suit, and while the former bond was in force, and that when the second bond was given, he had none of said funds in his hands.

This last plea was drawn to cover the real defense, which was, in substance, that the money belonging to the county had been deposited by the treasurer in the bank of one Strodtmann; that such deposit had been mainly, if not wholly, before the bond in suit was executed, and that the bank was then, and for some time had been insolvent, and did, on the 15th of November (about four weeks after the execution of the bond), suspend payment and make an assignment for the benefit of creditors.

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The reason assigned by the treasurer for not paying the county orders was that he had deposited the funds with this bank, and that the bank could not pay him, and the sureties say that as the bank was in fact insolvent and could not have paid all the liabilities when the bond was given, the default occurred while the old bond was in force.

It is not shown that the treasurer failed to pay any orders drawn upon him before the present bond was given.

The only breach alleged was committed afterward, and the plea of the surety is in effect that the principal was unable to pay the orders in question because he had placed his funds in a bank which, as now appears, had been insolvent for some time before this obligation was assumed.

The bank paid all checks up to the time it made the assignment, and no doubt the treasurer could have drawn out his funds after this bond was given.

He had not converted the money to his own use. He had merely put it in what proved to be an unsafe place. His agent was insolvent and could not meet all engagements.

The treasurer committed no breach of his bond by depositing the funds in a bank. He could keep the money where he chose, and if he accounted for it when legally called on, his duty was discharged.

Suppose he had paid these orders and all others up to the amount of public funds received; he could not have been held civilly or criminally, because he had lost a sum equivalent to all he had received, by the failure of this bank. Suppose the bank was insolvent at some date prior to the execution of this bond; it might have become solvent afterward, or, whether solvent or not, it might have paid this depositor in full, as it did many others.

For all that appears the treasurer may have had abundant property from which to meet his obligations to the county, though he had no cash in hand. In effect, the defense here set up raises the immaterial issue whether the treasurer was able to do so without the money lost in the bank.

The breach is that he failed to pay the orders; the defense

is that he could not have paid them, say sixty days before, if the bank had then been compelled to liquidate; and stated another way, it is that his agent was unable to account to him, and had really been insolvent during all the life of this bond.

What of it? There had been no orders drawn on the treasurer which he had failed to pay until after this bond was given. There had been no conversion by the treasurer nor failure to meet his official obligation, and whatever might have been the financial condition of the bank it need not follow that the treasurer would fail to account for the funds when, and as by law, required.

In a legal sense, the money was in his hands all the while, though the personal custody of it had been by him intrusted to an agent who failed to account to him for it when he had occasion to use it in discharge of his official obligation.

The fallacy of the position of the appellees is in assuming that the money had been misappropriated while the first bond was in force, and that no breach of the bond was shown by proving that he failed to pay orders issued after this bond was made.

We hold that the custody of the money by his agent was his custody, and if he chose to have it there his surety can not be heard to say that the agent would have been unable to pay.

It was the business of the treasurer to take care of the money and to place it in such custody as he might deem best. All the law requires is that he have it forthcoming when legally called upon, and until he fails in this respect he has committed no breach of this condition of the bond.

There was no misappropriation nor any wrongful use of the money nor any breach as to the payment of the same during the continuance of the old bond.

It is argued by counsel for appellees that by the terms of section 11, chapter 103, the sureties on the old bond are released from liability incurred by the officer in consequence of business coming to his hands after the new bond is approved, but that they are not released from liability pre-

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viously incurred, and therefore the responsibility is under the old bond because it is supposed the money was received and lost while the old bond was in force.

In effect the act of keeping the money in the bank was a continuing act. Each day the mind of a prudent man would consider the advisability of continuing the custody of his funds in the place where they had been formerly kept, or at any rate the mental process would be in substance that, unless some objection was apparent, no change need be made. When this new bond was given, the responsibility for money which he had previously deposited in the bank, and which he had not been required to pay out according to law, would rest upon the new bond.

Had this bond not been given, the treasurer's official term would have been cut off and the sureties on the old one would have had the right to take possession of his official effects, and they might have withdrawn this deposit as did many others, before the crash; but by the giving of the new bond the official term was continued and the old sureties were prevented from taking any steps to realize upon the official assets.

Thus, it is apparent that the sureties on the new bond have by their action made it inequitable and unjust for them to deny responsibility for the continuing acts of the official whose term would have otherwise come to an end.

Having thus deprived the sureties on the old bond of the opportunity and the means to withdraw the money from a bank which kept going for nearly a month, they can not be heard to say that the bank was then insolvent and therefore probably the money could not have been obtained.

While the law will regard the liability of sureties strictly, yet it will not favor one surety over another in this way.

Where, under the provision of section 10 of chapter 103, the officer is required to give a new bond or surrender his office, the giving of such bond and the continuance of his official tenure correspond in effect to another term with its incidents.

In such case the law transfers the funds and effects on

hand under the old term to the new. So, in the present case, when the new bond was given, the law would transfer any balance and the new bond would secure it. If the money was not in the pocket of the official but in the hands of his custodian, the duty of giving proper attention to the matter of changing or continuing the depositary would arise at once, and the action, done or omitted, in that regard, would attach to the new liability.

We are of the opinion the judgment for appellee was erroneous. It will therefore be reversed and the cause remanded.

Lake Erie & Western R. R. Co. v. L. S. Holderman.

1. RAILROAD COMPANIES—*Damage from Fire*.—Proof that a fire was set by sparks from an engine is *prima facie* evidence of negligence on the part of a railroad company.

2. PLEADINGS—*Special Damage*.—Under an allegation "damage to meadow land" it is competent for the purpose of showing such damage to permit witnesses to state the difference in yield between the portion of the meadow burned and the portion not burned.

Memorandum.—Action against a railroad company for damage by fire. In the Circuit Court of Ford County; the Hon. ALFRED SAMPLE, Judge, presiding. Declaration in case; plea of not guilty; trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1894, and affirmed. Opinion filed October 29, 1894.

CLOUD & KERR, attorneys for appellant; W. E. HACKEDORN, general attorney, of counsel.

COOK & MOFFETT and J. H. MOFFETT, attorneys for appellee.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

The jury awarded \$700 to appellee for the destruction of his pasture, hedge, hay and derrick, and damage to his

meadow land, by fire, alleged to have been set by sparks from a locomotive engine of appellant, on the afternoon of October 13, 1892, and the court refused to grant a new trial. From the judgment on the finding, defendant appealed.

The jury were doubtless satisfied from the evidence that the fire was caused as alleged. That fact is, by the statute, made "full *prima facie* evidence" of negligence on the part of the railroad company. L. E. & St. L. Consolidated Ry. Co. v. Spencer, 149 Ill. 97. Defendant introduced proof tending to show that the locomotive in question and the appliances used to prevent the emission of sparks, in construction and condition, were all that the law or diligence required, and were handled by those in charge with all due care. It can not be claimed, however, that it was conclusive, of itself, nor denied that there was some tending to show the contrary, especially as to the handling. On which side was the preponderance, was for the jury to determine, and on this question defendant had the benefit of instructions that were full, clear and strong. If, from the facts testified to without contradiction—that two fires, within half a mile, appeared on plaintiff's land almost immediately after the train passed, and that on the next day cinders were found there which appeared to be fresh—the jury believed that the fire was set as charged, they could have no confidence in the opinion of witnesses, responsible for the negligence, if any there was, founded on the construction and condition of the engine and its appliances and the manner in which they were handled, that the cinders could not have escaped from the smoke stack. The statute assumes that with proper appliances and management fire will not so escape, except from special causes, operating on the particular occasion, against which such appliances and management can not sufficiently guard. No such causes appear in this case, and we are not prepared to find, against the verdict and judgment below, that the *prima facie* case for plaintiff was fairly rebutted and overcome.

Several of the rulings on the trial are assigned as errors, but we think none of them sufficient to require a reversal of the judgment.

The statement of the local attorney for defendant, accepted as an affidavit in support of the motion for a continuance, was technically defective in failing to show that the person desired as a witness could ever be produced, and, as we think, substantially so in failing to show due diligence to avoid the mistake or misunderstanding by which Mr. Sage, instead of Mr. Jones, was sent to testify.

It is said plaintiff was allowed, over objection, to testify to the loss of his meadow grass in 1893, which, in its nature, was special damage, and not claimed in the declaration. One of the items alleged was damage to meadow land, and the witness, to show the fact of such damage, and the amount of it, was permitted to state the difference in the yield of 1893, between that portion of the meadow that was burned and of the part not burned, the other conditions being the same as to both. For that purpose we think it was competent. Railroad Co. v. Spencer, cited above. He did not ask and was not allowed to recover specifically for the loss of the grass, but for the injury to the land.

If the proper foundation for the impeachment of defendant's witness, Haggerty, was not laid by correctly fixing the time of his former statement, the objection to the evidence was not put upon that ground. Had it been, it could have been instantly obviated.

It is said it was improper to allow plaintiff to state his recollection of the size of the cinders he found on his land without producing them or accounting for their absence. The familiar rule of evidence referred to does not apply to such matters.

Objection is urged to the use in two of plaintiff's instructions, without explanation, of the term "*prima facie*." It has become sufficiently anglicized and understood to need no translation.

So also, to the phrase "engine or engines," as tending to make the defendant liable in this action for the condition

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of others than the only one that figured on the occasion here in question. The plural alternative was certainly useless and, we think, as certainly harmless.

The point of defendant's instruction, No. 9, refused, is assumed throughout the evidence and instructions on both sides, and is so palpable to common sense that no harm could have been done by its refusal.

Finding no material error in the record, the judgment will be affirmed.

State National Bank v. C. H. Payne.

1. **MONEY HAD AND RECEIVED**—*Action for, Equitable in its Nature.*—An action for money had and received by one person for the use of another is of an equitable character and lies whenever the defendant has money which, *ex equo et bono*, belongs to the plaintiff.

2. **SAME—Trust Moneys**—*Action for, by the Cestui Que Trust.*—D., who was indebted to C. in the sum of \$100, mortgaged property to P., and afterward, by his direction, sold a portion of the mortgaged property, with the intention of applying it on the mortgage debt, and received checks on a bank for the property, payable to his order. On presenting the checks for payment, an officer of the bank claimed payment of the \$100 owing to C. D. informed the bank of the facts, stating that the money was not his, but afterward tacitly agreeing thereto, the bank paid him the balance on the checks. *Held*, that P. could recover the \$100 from the bank in an action for money had and received to his use.

Memorandum.—*Assumpsit.* In the Circuit Court of Sangamon County, on appeal from a justice of the peace; the Hon. ROBERT B. SHIRLEY, Judge, presiding; trial by jury; verdict and judgment for plaintiff; appeal by the defendant. Heard in this court at the May term, 1894, and affirmed. Opinion filed October 29, 1894.

CONNOLLY & MATHER, attorneys for appellant.

JAMES E. DOWLING, attorney for appellee.

MR. JUSTICE PLEASANT DELIVERED THE OPINION OF THE COURT.

This suit was commenced by appellee before a justice of the peace and on appeal to the Circuit Court the verdict and judgment were in his favor.

The evidence clearly tends to show that in April, 1893, W. B. Diggs, who then owed one Cooke \$100, executed to appellee a chattel mortgage upon certain live stock and grain, including twenty-five acres of growing wheat, to secure a note to him for \$800 due one day after date with interest at six per cent per annum. In the following fall when it was being threshed, he turned it over to appellee, who was on the ground and arranged to pay the threshers, to apply on the mortgage debt. As his agent and by his direction, Diggs sold it to the elevator company in Springfield, receiving therefor its two checks on the bank payable to himself for \$154. When he presented them for payment, Mr. Jones, the father-in-law of Cooke, who claimed the \$100 that the latter had loaned to Diggs, and who was an officer of the bank, demanded, after the checks were presented, that he should pay that debt out of the money for which they were drawn. Diggs then told him he could not do so because that money belonged to appellee, but would pay it soon out of the proceeds of other sales, and left the bank. Within an hour he again appeared at the counter, where Jones told Pierik, who was then acting as paying teller, that Diggs agreed he (Jones) should have credit for \$100 and to pay him (Diggs) the balance. Pierik asked Diggs if that was right, and receiving no reply, paid him \$54 and some cents, which he took and went out. Some time thereafter appellee went to the bank and demanded this \$100, which was refused, and thereupon he brought this suit to recover it.

The defense is that the bank is not liable because there was no privity between it and appellee. This action is for money had and received by appellant for use of appellee, which is of an equitable character and lies wherever the defendant has money which, *ex equo et bono*, belongs to the plaintiff. In this case, though the legal title to the money was in Diggs, if the bank, through its officer, Jones, who received it, had notice that it was impressed with a trust in the hands of the party from whom he received it, we understand that the *cestui que trust* may recover it in this action

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at law as well as in equity. Whether it be so because in such a case no proof of privity between the parties is required, as held in *Drovers National Bank v. O'Hara*, 18 Ill. App. 182, or because the law always and conclusively implies it, as seems to be held in *Havana Press Drill Co. v. Ashurst*, 148 Ill. pp. 137 *et seq.* (140), the consequence is the same.

It is claimed that the case of *Hall v. Capen*, 27 Ill. 386 (and *Capen v. Hall*, 29 Ill. 512), is on all fours with the one at bar, and directly against the ruling in it. We see no analogy in fact or principle between them. There the defendants had no notice nor any ground for a suspicion that the money in question which he received belonged to the plaintiff, or was not the money of the party from whom he received it. The Supreme Court said it was his and not the plaintiff's. Here the defendant, when it received it, had full and distinct notice that it was the plaintiff's and not Diggs'. The difference could not be wider or more radical. We think the case of *O'Hara*, *supra*, affirmed in 119 Ill. 646, is decisive of this, and required the ruling of the court below on the instructions asked, which only is here assigned for error. Judgment affirmed.

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61	271

Petefish, Skiles & Co. v. Mary Buck et al.

1. **DOWER—Unassigned, Not Liable to Sale on Execution.**—A right of dower not assigned, though it may be released to one having an interest in the fee, can not be sold, either by the dowress or upon execution against her.

2. **SAME—Assigned, May be Sold, etc.**—When dower is assigned it becomes a life estate and may then be sold and transferred as any other life estate in lands either by the dowress or upon execution against her.

3. **EQUITY JURISDICTION—To Assist a Judgment Creditor.**—It is within the general jurisdiction of a court of chancery to assist a judgment creditor to reach and apply to the payment of his debts, any property rights or equitable interests of the judgment debtor, which, by reason of their nature only, and not by reason of any positive rule exempting them from liability for debt, can not be taken on execution.

4. *SAME—Dower Not Assigned.*—A right of dower in lands unassigned is such an interest as may be reached by a judgment creditor by the aid of a court of equity.

Memorandum.—In Chancery. Appeal from the Circuit Court of Cass County; the Hon. LYMAN LACEY, Judge, presiding. Creditor's bill; dismissed on demurrer; appeal by complainant. Heard in this court at the May term, 1894. Reversed and remanded. Opinion filed October 29, 1894.

STATEMENT OF THE CASE.

This was a bill in chancery filed by the appellants, in which it was alleged that the complainants, Petefish, Skiles & Company, recovered a judgment, April term (1893) of Circuit Court of Cass County, Illinois, against defendant Mary Buck, for \$333.49, with costs of suit, which is wholly unpaid; execution issued June 16, 1893, on said judgment, by clerk of said court, directed to sheriff of said county, and duly returned, no property found; that complainants know of no property of the defendant subject to be levied upon by execution; that defendant Mary Buck has a dower interest in 120 acres of land, which has never been assigned to her; that said land was the property of her first husband, Patrick Caldwell, who died intestate, seized in fee thereof, June, 1887, leaving him surviving his widow, said Mary (now Mary Buck) and four children, his sole heirs, Mary and Lizzie and Thomas and John, all of whom are minors and have no legal guardians; that said Mary, widow of said Patrick, has since intermarried with defendant William Buck, and she and her husband and said four children reside upon said 120 acres of land (here follows description thereof), and no other person or persons have any interest in said lands; that she, said Mary Buck, has never applied for an assignment of her dower in said lands; that she does not propose to have any assignment of her dower and homestead therein, but refuses to apply for such assignment in order to defeat complainants in collecting their said judgment. Prayer for appointment of commissioners to assign her dower and homestead in said lands and for appointment of a receiver to take control of dower interest when so as-

signed and rent the same, and out of said rents pay complainants' judgment, etc., and for such other relief as complainants are entitled to receive.

A general demurrer to the bill filed by the defendants was sustained by the court and the bill dismissed. This is an appeal from such action and decree of the court.

APPELLANTS' BRIEF, J. N. GRIDLEY, ATTORNEY.

Dower, before it is assigned, can not be sold under an execution. *Blaine v. Harrison*, 11 Ill. 384.

Dower is a right resting in action only. *Lomax's Digest Real Property*, Vol. 1, p. 92; *Reynolds v. McCurry et al.*, 100 Ill. 360.

Our statute, Chap. 22, Sec. 49, under "Creditor's Bills," provides that the court shall have power to decree satisfaction of a judgment out of any "thing in action" belonging to defendant, etc., etc.

Chancellor Walworth, of New York, in the case of *Tompkins v. Fonda*, 4 Paige (N. Y.) 448, says:

"The widow's dower before an assignment, is a mere right, or chose in action. She has not, therefore, such an interest in the land as can be sold on execution. In equity, if the widow is in possession or entitled to an assignment of her dower immediately, the want of a mere formal assignment of dower is not considered material. And if she has received the income of the whole premises, either as guardian of the heir at law or otherwise, she will, upon the taking of an account thereof, be entitled to retain her third, although her dower has not been assigned. She has no right, therefore, in conscience or equity, to deprive her creditors of the benefit of her right of dower for the satisfaction of their debts by continuing in possession with the heirs and neglecting to ask for a formal assignment, which assignment and entry under it, could enable the creditors to reach it by execution. The right of dower of defendant is such an interest as may be reached by the aid of this court, applied to the satisfaction of the complainant's judgment." (*Jacobs' Law Dict.*, title *Chose Termes De La Rey*, *Chose in*

Action.) Although the legal title to a mere chose in action can not be assigned so as to authorize the assignee to maintain an action at law in his own name, yet in equity such assignments are sustained. And even the courts of law now recognize the validity of such assignments, so far as to protect the interests of the assignees against a release or discharge of the right of action of the assignor. *Tompkins v. Fonda*, 4 Paine (N. Y.) 448.

Our statute in relation to creditor's bills was copied from the statute of New York, since the above decision in *Tompkins v. Fonda*, and we are presumably governed by the decisions of the courts of that State. *Singer & Talcott Stove Co. v. Wheeler*, 6 Brad. 228.

The adoption of a statute of a sister State generally carries with it the construction the courts have given it. *Hudson v. King*, 23 Ill. App. 118. It is presumed to have been adopted with the construction given it by such other State. *Coles v. Bentley*, 26 Ill. App. 260.

Scribner in his treatise on the Law of Dower, Vol. 2, Chap. 2, Secs. 39 and 40, pages 45 and 46, quotes this New York case at length, and cites no decisions in conflict therewith, but also refers to *Stewart v. McMartin*, 5 Barb. (N. Y.) 438; 4 Kent, 61; 1 Hilliard, *Personal Property*, 2d Ed., 165, Sec. 15.

POLLARD & PHILLIPS, attorneys for appellees.

MR. JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

Right of dower not assigned, though it may be released to one having an interest in the fee of the land, can not be sold by the dowress nor upon execution against her. *Blain v. Harrison*, 11 Ill. 384; *Norman v. Willett*, 48 Ill. 534. When assigned it becomes a life estate, and may then be sold and transferred as any other life estate in lands, either by the dowress or upon execution against her. *Summers v. Babb*, 13 Ill. 483.

The bill alleges that the dowress in the case at bar in order to defeat the collection of the judgment against her

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refuses to apply for an assignment of her dower. It is within the general jurisdiction of a court of chancery to assist a judgment creditor to reach, and apply to the payment of his debt any property, rights or equitable interests of the judgment debtor, which by reason of their nature only, and not by reason of any positive rule exempting them from liability for debt, can not be taken on execution. *Auger v. Murray*, 105 U. S. 126; *Bayard v. Hoffman*, 4 N. Y. 450; *Beck v. Burton*, 1 Paige (N. Y.) 308; *Roberts v. Hodge*, 16 N. J. (Eq.) 302; *Scribner on Dower*, Vol. 2, Sec. 39. In the case of *Tompkins v. Ford*, 4 Paige (N. Y.) 448, it was held that the right of dower is such an interest as may be reached by the aid of an equitable court, and applied to the satisfaction of a judgment against the dower in the manner contemplated by the bill in the case at bar. Nor do we regard the ruling in that case as resting, as is suggested, upon the particular provisions of the statute of the State of New York, but think it but declaratory of a general and fundamental doctrine of equity. It follows that in our opinion the bill was not obnoxious to the demurrer. Therefore the decree is reversed and the cause remanded with directions to the court to overrule the demurrer and require the appellees to answer the bill.

Bartolo Leon v. Eva Leon et al.

1. **MEASURE OF DAMAGES**—*Action by Heirs Against an Administrator*.—In a suit brought by heirs against the personal representatives of a deceased ancestor, to require an account for money received by such representative, the measure of the recovery is not necessarily the amount of money received by such representative. Equity requires the accounting only to the heirs for any loss they may have sustained.

2. **ADMINISTRATORS**—*Protected by Formal Orders of the County Court*.—An administrator should not rely upon the verbal authority of a county judge for instructions in regard to his dealings with the estate. He should have a formal order of the County Court, duly entered of record, authorizing him to act.

8. **GUARDIANS—*To be Dealt With Equitably.***—Because a guardian has acted in an irregular way, is no reason why he should be dealt with inequitably. In the absence of proof showing that his wards have been injuriously affected by his action, and in the absence of fraud on his part, the account should be stated according to the principles of equity.

Memorandum.—In chancery. Appeal from the Circuit Court of Montgomery County; the Hon. JACOB FOUKE, Judge, presiding. Bill and decree for accounting; appeal by defendant. Heard in this court at the May term, 1894. Reversed and remanded. Opinion filed December 14, 1894.

J. M. TRUITT and AMOS MILLER, attorneys for appellant.

WILLIAM A. HOWETT and LANE & COOPER, attorneys for appellees.

MR. PRESIDING JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree in chancery against the appellant for \$3,151.27.

The bill was filed by Eva and Ellenora Leon against appellant, Bartolo Leon, to compel him to account for money received in the capacity of administrator of Ellenora Leon, deceased, mother of complainants and of Mary Leon, who was joined as defendant, and also for money received by him in the capacity of guardian of the complainants and of the said Mary.

It was alleged that as administrator he had fraudulently allowed a claim to be probated against the estate for the sum of one thousand dollars in favor of Antonio Leon, father of the complainants and of said Mary, and had paid the same knowing that the claim was unjust, and therefore that he ought to account for the sum so withdrawn from the estate.

The court found for complainants as to this item. While the evidence is not entirely clear, yet we are disposed to agree with the Circuit Court that the charge is sustained. It is, however, objected here, as it was in the Circuit Court, that admitting the claim was unjust and was fraudulently allowed,

the heirs ought not to recover of the administrator more than two-thirds of the amount, for the reason that said Antonio, their father, was entitled to one-third of the money thus withdrawn in his right as husband of the intestate. In other words, if this sum of \$1,000 had remained in the estate he would have drawn one-third of it upon the final distribution, and so the alleged fraudulent act of the administrator had injured the heirs not more than the remaining two-thirds, which would have been added to the sum received by them on the final distribution. The answer made by appellees to this position is that "no one shall be permitted to take advantage of his own wrong." We do not see the force or application of this answer.

It is equitable to require an administrator to account to the heirs for any loss they have sustained by his fraudulent act, but it is not equitable to give them more in that behalf than they would otherwise have received. If they are made whole they should be content.

Another answer suggested in the brief of appellees is that a claim was allowed against the estate of Mrs. Leon in favor of the *Ætna Life Insurance Co.*, on a note signed by Antonio and Mrs. Leon, which was really the debt of Antonio, and that as this was paid by the administrator out of the funds of the estate there arose a claim in favor of the estate against Antonio for the amount, some \$568, which would exceed the one-third of said fraudulent allowance.

If this were established by the proof, the position would seem to be well taken; but there is nothing in the record to sustain it. All that appears on this point is that the administrator, in his final report, asked credit for cash paid on a claim in favor of said *Ætna Life Ins. Co.* for said amount, and that his voucher therefor consisted of a receipt signed by certain attorneys acknowledging payment to said company in full of the "A. Leon loan." The appellees sought to add to the record filed in this court a copy of the note upon which said claim was based which appeared to have been signed by Antonio Leon and Ellenora Leon, but it was not made a part of the record by the certificate

of evidence, and we were of opinion that it could not be so considered on the showing made in support of the motion to amend the record. If, however, it were properly before us, it would not be sufficient to support the position that the debt was that of Antonio alone. Additional evidence would be required for that purpose.

We are of opinion it was error, upon the case as made by the record, to charge the appellant with more than two-thirds of said sum of \$1,000.

The alleged misfeasance of the appellant, as guardian, was that he had received and failed to account for certain rents of lands inherited by the complainants and their sister Mary. The land consisted of a farm belonging to their mother, who died in September, 1876. It was rented by appellant to James Drew for three years from March 1, 1877, and his reports as guardian show that he duly accounted for the rent of those years.

In the first of these reports he asked credit for six payments of \$54 each for money paid to Antonio Leon for keeping the three wards. These credits were allowed by the County Court, and nothing appears in this record to justify the conclusion that they were improperly allowed, yet we find that two of these credits of \$54 each were disallowed in the statement of the account in this decree, and thereby the appellant was charged with the aggregate of \$104, and interest thereon annually compounded. This was erroneous.

For three years after Drew left the farm, it was occupied by Antonio Leon, who had married a second time, and with whom the three wards of appellant had lived ever since the death of their mother. He fed and clothed them and sent them to school. He was without means, except a pension which was afterward granted to him by the United States government.

He was in poor health, and his circumstances were such as satisfied the County Court that it was proper to pay him from the estate of the wards a reasonable sum for their support. While Drew lived on the farm this was done by cash payments, as already stated. While Antonio lived on the farm, with the approval of the county judge, he was allowed

by the guardian to keep the rents in consideration of paying taxes and supporting the wards.

Finally, his health was so impaired that he gave up the farm and afterward went away to Colorado, California, and at last, to Alabama, where he died in 1889, of consumption, which had afflicted him from a date preceding the death of his first wife. He kept and supported his children, the wards of the appellant, and two others born of the second marriage, up to his death.

After he left the farm it was rented by appellant to Fred Yeske for five years, to John Pick for two years, and to James Gillard for two years, for cash \$150, for one year, \$240, each for four years, and at \$200 each the remaining years, all of which rents were paid to appellant, except \$100, which was paid by the tenant to Antonio in the fall of 1887. The evidence satisfactorily shows that the moneys so received by appellant were by him paid to Antonio up to the time of his death, except what was required for necessary repairs, etc., and that this was in consideration that he would continue to support the wards. From the time Antonio went on the farm until he died, a period of some nine years, the appellant did not charge himself with the rents, nor did he take credit for moneys paid to Antonio for support of wards; but, as he testifies, and as he is corroborated in that respect, having the verbal authority of the county judge, he allowed Antonio to keep the rents while he remained on the farm and paid them to him after he left in consideration of the care and support of the wards, and the reports made by him as guardian during this period, contain but few credits on account of the wards. From the proof it is reasonably clear that the care and support of the wards would have been worth as much as the rents if not more; and if furnished by a stranger would certainly have cost considerably more. It appears that Antonio cared for the children properly; that they were always comfortably clad, and that if his dower interest in the land had been deducted there would have been less than enough remaining to compensate him for their support.

In the account as it was stated by the decree herein, the

appellant was charged with rents from the time Antonio left the farm, with compound interest, without credit for the support of the wards.

This was, as we think, inequitable and erroneous. While the course pursued was irregular, yet there was no substantial injury done to the wards.

The verbal authority of the county judge to make this arrangement was certainly not what the appellant should have relied upon. He should have charged himself in his reports with the rents, and should have asked credit for whatever was right for the support of the wards, which probably would have exceeded their income, had they been charged what it was reasonably worth; or he should have had a formal order of the County Court, duly entered of record, authorizing him to do what he did. But because he acted in this irregular way is no reason why he should be dealt with inequitably.

In the absence of proof showing that the wards were injuriously affected by his action, and in the absence of fraud on his part, the account should be stated according to the principles of equity. If the rents were no more than equal to what he paid out for necessary repairs or taxes and what he properly expended for the wards in addition to what might have been fairly charged by Antonio for their support and care from the time the latter left the farm until he died, then the appellant should not be charged for the rents during that period.

The appellant made no charge for commissions in his reports, but he now seeks a credit on that account. We see no reason why he should not be allowed fairly in this regard within the limits fixed by statute.

It is not necessary to discuss the question raised by appellant as to the propriety of granting to Mary, who was in form a defendant, the same measure of relief accorded to complainants, the rights of all three being alike.

If upon another hearing it shall be deemed necessary, the pleadings can be amended to avoid the objection urged in this behalf, as to the necessity whereof we express no opinion.

The decree will be reversed and the cause remanded.

Jane Thompson, Administratrix, v. Smith W. Wilson.

1. **WITNESSES—Parties at Common Law.**—The common law prohibited a party to the record in actions at law from testifying in behalf of himself, or a co-defendant.

2. **SAME—The Disqualification Under the Statute.**—The common law disqualification, though removed by our statute as to parties generally, is continued as to defendants in suits brought by a plaintiff in the capacity of an administrator.

3. **SAME—The Rule in Chancery Not Affected by the Statute.**—In courts of chancery a defendant is a competent witness to speak in behalf of a co-defendant as to any matter in which he has no interest. The fact that a witness is a party, is not considered in courts of equity, the only inquiry being whether he is called to support his own interest. The statute has not changed this rule in equity.

4. **SAME—The Test of Interest.**—The true test of the interest of a witness is, that he will either gain or lose by the direct operation and effect of the judgment, or that the record will be legal evidence against him.

5. **SAME—May Testify Against Interest.**—A witness, if otherwise competent, may testify against his interest.

6. **SAME—Competency Not Affected Because Evidence May Criminate.**—The objection that evidence may tend to criminate the witness does not affect his competency; it is his personal privilege to refuse to testify as to such matters, but he is not incompetent if he chooses to waive the privilege.

7. **SAME—The Extent of the Privilege—Decrees in Civil, Not Admissible in Criminal Actions.**—A decree rendered in a civil action is not admissible in a criminal proceeding to prove the guilt of the witness.

8. **INJUNCTIONS—Actions at Law Where Witnesses are Incompetent.**—When one defendant in an action at law is incompetent to testify as a witness, solely because he is a party, his co-defendant may, in order to obtain the benefit of his testimony, enjoin the action at law and have the cause tried in a court of equity.

Memorandum.—In chancery. Appeal from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding. Bill for injunction; hearing and injunction ordered; appeal by defendant. Heard in this court at the May term, 1894, and affirmed. Opinion filed October 20, 1894.

STATEMENT OF THE CASE.

Smith W. Wilson and George W. Wilson were, on December 30, 1890, and for several years prior thereto had been,

engaged as general partners under the firm name of S. W. Wilson & Bro., and conducted a large business in manufacturing, contracting and building brick work.

George W. Thompson died in March, 1893, and Jane Thompson, his wife, was appointed administratrix of his estate. She found among his notes and the assets of his estate, a note dated December 30, 1890, for \$182 and interest, payable to her intestate in eighteen months from date. On December 1, 1893, Smith W. Wilson, the only solvent member of the firm, having refused to pay the amount of the note, she began suit against him in the Circuit Court of McLean County, Illinois. While this suit was pending and before it was reached for trial, the bill in this case was filed, an injunction obtained and appellant was enjoined from prosecuting the suit. This appeal is from the order granting injunction under the act of June 14, 1887, providing for appeals from orders granting injunctions, etc.

APPELLANT'S BRIEF, EDWARD BARRY, ATTORNEY.

Before the passage of our statute on "Evidence and Depositions" by the rules and usages of courts of chancery, one defendant was held competent to testify in behalf of a co-defendant on any question in the decision of which he had no interest. The passage of that statute has in no manner impaired the rule. No witness is rendered incompetent by the statute who was competent before it. *Bradshaw v. Combs*, 102 Ill. 428.

One who has a direct certain legal interest in the event of a suit is not a competent witness on the side of his interest. By "legal" is not meant only such interest as can be asserted in a common law court, but it embraces any interest that can be asserted in any court of justice. *Blum v. Stafford*, 4 Jones (N. C.) L. 94.

When the verdict and judgment would be evidence for or against the witness in another suit, then he is incompetent; and the test whether they would be evidence for him is the inquiry, would they be evidence against him if adverse to

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the party introducing him. *Coltart v. Laughing House*, 38 Ala. 190.

The true test is, "Will the witness gain or lose by the direct legal operation and effect of the judgment, or will the record be evidence for or against him in some other action?" 1 Phillips' Ev. (3d Ed.) 119-126; Greenleaf, Vol. 1, Secs. 389, 390; *N. E. F. & M. Ins. Co. v. Wetmore*, 32 Ill. 221; *McClure v. Otrich*, 118 Ill. 320; *Campbell v. Campbell*, 130 Ill. 466.

If the record will be evidence for or against him, then he is an incompetent witness. *Eaton v. Gentle*, 1 Chand. (Wis.) 10; *Bailey v. L.*, 1 Geo. 392.

OWEN T. REEVES, attorney for appellee.

MR. JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

Counsel for the appellant administratrix in his brief says: The question presented by this appeal is, "When the administratrix of the payee of a note brings suit thereon at law against the members of a firm, the note being signed in the firm's name, can one of the firm, by filing a bill in chancery making the plaintiff and the other partner defendants thereto, thereby render his partner, so made defendant, a competent witness in equity for him, to show that he told plaintiff's intestate when he signed the note in the firm name and delivered it to said intestate, that the money so borrowed was for his own individual use, and not for his firm, or that he had no authority to sign the firm name?"

The rule of the common law prohibited a party to the record in an action at law from testifying in behalf of himself or co-defendant. The disqualification, though removed by our statute as to parties generally (Sec. 1, Chap. 51, R. S., entitled Evidence), is expressly continued in force as to defendants to suits brought, as was the case in this instance by a plaintiff in the capacity of an administratrix. (Sec. 2, Chap. 51, *supra*.) In the action upon the note the defense of the appellee could not be brought before the court for consideration because a rigid rule of law closed the mouth of the only

person living who had knowledge of facts necessary to maintain it. In courts of chancery, before the enactment of our statute on evidence, a defendant was a competent witness to speak in behalf of a co-defendant as to any matter in which he had no interest. The fact that a witness was a party, was not considered in courts of equity in determining his competency, the only inquiry being whether he was called to support his own interest. *Kimball v. Cook*, 1 Gilm. 423; *Dyer v. Martin*, 4 Scam. 146; *Bradshaw, Admr., v. Combs*, 102 Ill. 428; *Smith v. West*, 103 Ill. 332. The enactment of our statute in no manner impaired this chancery rule. *Bradshaw, Admr., v. Combs, supra*. The defense the appellee desired to present in the action at law was a lawful and meritorious one, but an inflexible rule of law under the particular circumstances of the case excluded the only proof available to support it. Equity courts had no such rule and resort to that tribunal became a necessity, and its aid was, we think, properly invoked and granted. This conclusion rests upon familiar fundamental principles fully recognized and enforced in *Bradshaw v. Combs, supra*, and in *Dodson v. Henderson*, 113 Ill. 360.

It is, however, urged that the party who testified as a witness had a disqualifying interest in the litigation. The true test of the interest of a witness is that he will either gain or lose by the direct operation and effect of the judgment or that the record will be legal evidence against him. 1 Greenleaf on Evid., Sec. 390. A witness, if otherwise competent, may, of course, testify against his interest. 1 Greenleaf, Evid., Sec. 410. The testimony of the witness in this instance tended in no degree to relieve or favorably affect him, but rather to the contrary.

It is urged that the witness should not have been permitted to testify because his evidence and a decree based thereon would establish a charge of forgery against him. The argument in support of this seems to be that the testimony of the witness, or the record made in the case, would constitute legal evidence tending to establish against him a charge of forgery, and for that reason he was either incompetent or disqualified to testify. The objection that

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evidence may tend to criminate the witness does not affect his competency to testify. It is his personal privilege to speak as to a matter tending to criminate himself, but he is not incompetent to testify if he sees fit to do so. 1 Greenleaf, Evid., Sec. 451. Moreover a decree rendered in a civil action is not admissible to prove guilt in a criminal proceeding. 1 Greenleaf, Evid., Sec. 537. If it was admissible, a witness would not, for that reason, be incompetent to testify to facts upon which the decree proceeded. He might assert or waive his privilege as pleased him best. The decree must be affirmed.

OPINION ON MOTION FOR REHEARING BY MR. JUSTICE BOGGS.

Counsel for the appellant administratrix, in aid of a motion for rehearing, has called our attention to the case of Phillips v. Love, lately decided by the Appellate Court of the First District and reported since the opinion in the case at bar was filed. Phillips v. Love, 54 Ill. App. 526.

The relief prayed in that case was the same as in this and the material facts were in no wise different.

The conclusion reached by that court was that a court of equity was without jurisdiction to entertain the bill and grant the relief prayed, and that the doctrine announced and enforced in the cases of Bradshaw v. Combs and Dodson v. Henderson, *supra*, had application only when the aid of an equitable court was invoked by and in behalf of a surety.

We thought the decision of those cases rested upon well recognized principles of equity jurisprudence, applicable to every suitor, if the facts of his case brought it within the doctrine there recognized and acted upon.

A re-examination of the authorities has confirmed us in that view.

Speaking of the power of courts of equity to interpose by process of injunction, and control the rights and proceedings of suitors in actions at law, Mr. Story, in his work on Equity Jurisprudence, Sec. 884-885, says:

"In most of the cases of this nature there is no pretense to assert the jurisdiction upon any of the ordinary grounds

of fraud, accident, mistake or confidence. It stands upon more enlarged principles of general justice and was probably derived from the Roman civil law, where, as we have seen, equities of this sort were not unfrequently entertained. Indeed the occasions on which an injunction may be used to stay proceedings at law, are almost infinite in their nature and circumstances.

"In general it may be stated that in all cases where, by accident, fraud or otherwise, a party has an unfair advantage in proceedings in a court of law, and it is therefore against conscience that he should use that advantage, a court of equity will interfere."

Speaking to the same question another law writer said :

"In the first place it is well settled that equity will not restrain an action at law on the application of the defendant, if he has a perfect defense at law, unless the injunction is necessary to make the defense available." Willard's Eq. Juris., page 347.

In Jeremy's Equity Jurisdiction, Sec. 338, it is laid down that an injunction will be granted "where a court of law is applied to for redress in a case of civil injury and the defendant is unable to supply the necessary evidence to rebut the plaintiff's claim except through the medium of this assistant jurisdiction of a court of chancery." Nor are we without adjudicated cases in support of the doctrine announced by those text writers.

In the case of Norton v. Woods et al., 5 Paige 249, the nominal plaintiff, H. Bulkley, who had no real interest in the suit, was the only witness by whom the defendant could prove his defense to the action. Parties to the record were not then competent witnesses. The defendant, who was not a surety, sought to obtain the benefit of the testimony of Bulkley through the medium of the process of injunction. The Court of Chancery of the State of New York entertained the bill. The opinion of the court was rendered by Chancellor Walworth who, in the course thereof, said :

"The only remedy in such cases appears to be by resort to this court, not upon a mere bill of discovery, but by bill for

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relief where persons who have no interest in the litigation may be examined as witnesses for either party. * * * The facts stated in the bill, if established at the hearing, appear sufficient to constitute a case for equitable relief."

Afterward the same court had before it a bill brought by a surety to restrain proceedings at law because he needed the testimony of a party to the action and it was then said:

"The jurisdiction of this court to compel discovery in aid of a prosecution or defense at law is founded upon the fact that by the strict rules of law, a party to the record in a suit at law can not be compelled by his adversary to prove facts within his own knowledge.

"Upon the same principle, this court, in *Norton v. Woods*, 5 Paige 249, sustained a bill for relief upon the ground that it appeared from the bill that a valid defense existed at law, but of which he could not avail himself there, because the only witness who knew the fact and was not interested in the suit was a party to the action at law. I do not see how that case can be distinguished in principle from the present."

Miller v. McCann, 7 Paige Chan. Rep. 451, *Jarvis v. Chandler*, Turn. & Russel Reports 319, and *Metler v. Metler*, 4 C. E. Green 475, are cases where jurisdiction was entertained in chancery of bills asking for this relief by persons not sureties.

We are constrained to adhere to the conclusions announced in our former opinion.

The motion for a rehearing is therefore denied.

Bloomington Electric Light Co. v. Charles Radbourn.

1. **CONTRACTS—Rescission and Abandonment.**—It is not every failure, neglect or refusal of one party to comply with some of the terms of a contract which will entitle the other to abandon it upon notice to the delinquent. To justify an abandonment of a contract the failure must be total, such as to defeat the object of the contract.

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Memorandum.—*Assumpsit.* In the Circuit Court of McLean County, on appeal from a justice of the peace; the Hon. THOMAS F. TIPTON, Judge, presiding. Trial by jury; verdict and judgment for defendant; appeal by the plaintiff. Heard in this court at the May term, 1894. Reversed and remanded. Opinion filed October 29, 1894.

APPELLANT'S BRIEF, A. E. DEMANGE, ATTORNEY.

For particular derelictions and non-compliance in matters not necessarily of first importance to the accomplishment of the object of the contract, the party must still seek his remedy upon the stipulations of the contract itself by an action for damages for its non-fulfillment. *Wentz v. Hefner*, 78 Ill. 27; *City v. Joslyn*, 136 Ill. 530.

To justify an abandonment, the object of the contract must have been defeated or rendered unattainable by misconduct or default of the other party. *Selby v. Hutchinson*, 4 Gilm. 319.

It is well said in the opinion of the court in the case last above cited, "It is not every failure, neglect or refusal to comply with some of the terms of the contract by one party which will entitle the other to abandon the special and solemn obligation entered into by the parties, and by which they had made for themselves the law which was to control them. In order to justify an abandonment of the contract, the failure of the opposite party must be a total one." *Doggett v. Brown*, 28 Ill. 495.

APPELLEE'S BRIEF, ROWELL, NEVILLE & LINDLEY, ATTORNEYS.

If one of the parties to a contract breaks it, either first by a renunciation of the contract; or second, by rendering performance of his part impossible; or third, by a failure of performance on his part where such performance is a condition concurrent with or precedent to the performance of the other party, the latter may rescind the contract; or, in other words, his obligation to perform is discharged by the breach of the former. *Hochster v. De la Tour*, 2 E. & B. 678; *Frost v. Knight*, L. R. 7 Ex. 111; *Fox v. Kitton*, 19 Ill. 519; *Chamber of Commerce v. Sollitt*, 43 Ill. 519; *Follansbee v. Adams*, 86 Ill. 13.

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Where the failure of one party is to an extent such as renders his performance different in substance from what was contracted for, the party not in fault may abandon the contract. *Leopold v. Salkey*, 89 Ill. 412; see, also, *Weintz v. Hasner*, 78 Ill. 27.

If the object of the contract has been defeated by the failure of one party, the other may treat the contract as abandoned or rescinded. *Selby v. Hutchinson*, 4 Gilm. 319.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

On July 1, 1892, appellant, by W. V. McKinzie, its superintendent, entered into a contract under seal with appellee, by which it agreed to wire his place of business for eight 32 and three 16-candle power incandescent lamps, and furnish sockets, lamps, and cut out for the same and for one arc lamp, for \$10 to be paid by him when the wiring should be done and the lamps, etc. furnished; and also to furnish current for said incandescent lamps for one year, from dark to 7 o'clock A. M., Sundays excepted; and for said arc lamp for that period, from dark to 11 P. M., Sundays excepted, and also, except when prevented by strikes, fire, lightning or accidents, for \$15 per month, payable monthly, at the end of each month from the date of said contract. The lamps, sockets and cut-outs were to remain the property of the company, not to be interfered with, but properly protected and cared for by appellee in said building, until the contract should expire and said property be removed by appellant; and appellee was to purchase his renewal lamps of appellant at the rate of \$1 each, payable with the current bills at the end of each month.

Appellee's place of business, a liquor saloon and billiard hall, in Bloomington, was wired and furnished with the lamps, etc., and a current, which were paid for by appellee according to his contract and without objection, until the first of October, when at appellee's request the arc light was taken out by appellant, three 32-candle power incandescents substituted, for the reasons assigned by appellee that

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the incandescents would distribute the light better over his billiard table and also that they burned all day and the arc did not, and the price was reduced from \$15 to \$14 per month. The parties went on under the arrangement, so modified, until December 4th, when appellee cut and pulled out the wires and refused to take the current from appellant any longer. Appellant, continuing to manufacture and being ready and offering to furnish it according to the contract, brought this suit before a justice of the peace for current for the month of December. On the trial, upon appeal, in the Circuit Court, the jury returned a verdict for the defendant and the court, after overruling plaintiff's motion for a new trial, rendered a judgment against it for the costs; from which judgment this appeal is taken.

The ground upon which appellee refused to make further payment was the alleged insufficiency of the light furnished for the purpose intended, substantially defeating the known object and purpose of the contract.

Upon a careful consideration of the evidence we think it clearly fails to justify the attempted rescission on this ground.

The concurring testimony of three witnesses, wholly uncontradicted or otherwise in any way discredited, would leave a court or jury without excuse for doubting that in this case the work of wiring the appellee's place of business was of the first class; that the lamps furnished by appellant were of the best kind known in the market and of the full candle power called for; that the current furnished, as shown by the indicator at the power house during the months of September, October and November, 1892, was 52 volts—being two points more than the standard for such lamps, and making the light brighten to that extent—varying therefrom only for a few minutes when the machines were changed between 5:30 and 6 o'clock P. M., and that it was furnished to appellee many hours more per day than was required by the contract.

These witnesses were the superintendent and two line-men of appellant. They were the parties to whom com-

plaint should have been made or notice given of any defect of the light. The company kept two offices, both reached by telephone, and a man always in attendance to answer calls for service. They testified that they received none except in October, when the three incandescent lamps were substituted for the one arc at appellee's request, made for the reasons stated, and again in December, when the fuse blew or burned out, a pure accident, and a man was promptly sent to put in a new one, the work of only three or four minutes, but was, by appellee, forbidden to do it, with the statement he was going to take light from the other company. The only reason he ever gave for abandoning the contract, so far as they knew, was that appellant was charging him too much, and he could get cheaper light from the other company, to which both the superintendent and the collector of appellant testified, without contradiction.

Appellee did not offer himself as a witness. His bartender, his step-son and three others who more or less frequently visited his place, were all who testified to any trouble on account of the light. Of these, the bartender seemed disposed to be the most effective and important. Yet the fault he found was chiefly with the arc lamp, for which three 32-candle power incandescents were substituted on the first of October. It appears that the billiard room was fifty feet in length, and the one arc light had been used for all the tables. Very probably it was better distributed by having one incandescent for each, which also burned all day. Of the others, aside from his general statement that the lights were poor, the only definite complaint he made was that "they seemed to go down at times. That would last ten or fifteen minutes. Then they would shoot up again. That happened sometimes once a week and, sometimes twice." To one annoyed by the failure, what seemed ten or fifteen minutes might have been no more than three or five. He says when it happened, he telephoned or went down to the works, and that some one would come in ten, fifteen or twenty minutes and that "we

were all right after that." He went to the power house once or twice; how often he telephoned, he did not state.

Appellee's step-son says "part of the time there wasn't much of a light, and then they would go out; sometimes go out once a week and sometimes would not. Sometimes it would light up pretty good and then it would go down." To what does testimony so indefinite as to frequency of failure and its extent when it occurred amount? Of what electric light could not as much be truly said?

Edwards was in the saloon and billiard room almost every night in September, October and November. His statement is equally indefinite. They had to stop playing "a good many times," because "the lamps would flicker out for a few minutes and then start up again, and sometimes wouldn't start up at all." He never paid any attention to see, if they got some one to fix them. "The incandescent lamps went out several times when he played billiards. They lit them again when they went out. I don't know whether it was caused by an accident or not."

Hunter says, "On one or two occasions I was in there and the light went out in September, October and November. I am referring to those arc lights." There was no arc light after September, and he didn't know whether the going out was or was not caused by accident.

Sellman was in the place "once in the summer or fall of 1892," and says, "the light went out the night I was there. I don't know whether the fuse blew out or not."

Mr. Brackel, an electrician and telephone manager, whose office adjoined appellee's building, was the only other witness called by him, but he testified that "he never noticed any objection to his lights during September, October and November, 1892."

McKinzie, appellant's superintendent, says he was in there during those months, once or twice a week, and passed there oftener, to see if his light was all right, and it was good; up to the standard; the candle power and voltage all right. But notwithstanding all this, the light will occasionally go down or out for a few minutes, from accidents

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which can not be avoided. The fuse, which is put in for safety to the building, may blow out, or the light be dimmed by the slipping of a belt or suddenly increasing the load on the machine. This company furnished current, not for a fixed amount of light, but for such as wanted it, and thus the amount actually used, was constantly and often materially changing. An example given was the Opera House, which suddenly turns on a great number of burners; and so of other places. But the variation, in such case, while unavoidable, lasts not more than five minutes.

We are clearly of opinion from the evidence that such only were the defects or failures of the light furnished by appellant; that they were only occasional, trifling, common, anticipated by the parties, excepted in their contract, and fully accounted for by the causes mentioned. Any further inconvenience suffered by appellee was due to his own neglect to have more lamps and to renew them as necessary occasion required, and that his motive for the change of companies was purely economical, and without regard to the obligation of his agreement. The case is far from being within the rule announced in any of the authorities cited, allowing a rescission or abandonment of the contract. No instance of appellant's neglect to respond to any call made upon it for attention to any trouble from whatever cause arising, was shown.

The finding of the jury is hardly to be accounted for except by the instructions given them, which seem to be contradictory.

On behalf of the plaintiff, the jury were told: "Under the contract introduced in evidence, even if you believe from the evidence that accidents happened whereby defendant's light was affected, or even if you believe from the evidence said light became defective without apparent cause, it was the duty of defendant to notify plaintiff at its power house or office, of such accident or defective light, and to give plaintiff reasonable time to repair such accident or remedy such defect; and defendant had no right under said contract to rescind or annul the same because of such accident or

defective service, unless you believe from the evidence that such accident happened, or the said light became defective, and plaintiff, after reasonable notice, neglected or refused to repair such accident or remedy such defect in said light."

And on behalf of defendant as follows: "The court instructs the jury that if the plaintiff company failed to comply with their part of the contract as to furnishing current in accordance with the contract, then the defendant had the right to stop using the light, and that the plaintiff can not recover for any time after the defendant notified the plaintiff that the light was not according to contract and that he would not use it any longer, if the jury believe from the evidence that the defendant gave such notice."

And they were further instructed that by the contract the light to be furnished was to be "a permanent one, and that if you believe from the evidence that the light was constantly giving out and did not come up to the agreement of the plaintiff in their contract, then you should find for the defendant."

Thus for one side the jury were instructed absolutely, in substance, that notwithstanding its failure from accident or otherwise to comply with its contract, the other party could not rightfully rescind or abandon it, without first giving notice of such failure and a reasonable time to comply; and for the other, also absolutely, in substance, that upon such failure, whether from accident or otherwise, and without regard to its extent, he could rightfully rescind or abandon the contract upon, and from the time of mere notice of such failure.

The jury could not accept either without rejecting the other. They seem to have accepted the latter, which was much the farthest from an accurate statement of the law applicable to the evidence in this case. It is not every failure, neglect or refusal of one party to comply with some of the terms of a contract which will entitle the other to abandon it, upon notice to the delinquent or by any other means he can use. To justify an abandonment the failure must be total, that is, such as to defeat the object of the con-

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tract or make it unattainable. *Selby v. Hutchin*, 4 Gilm. 319; *Doggett v. Brown*, 28 Ill. 495.

There was no proof that the wiring of the appellee's place of business was in any way or degree defective or that any lamp furnished was of less candle power than the contract called for. It did not stipulate for a "permanent" light, by which the jury might well understand one that should be steady and uninterrupted during the time mentioned. On the contrary it was only for a proper current, and as to that expressly excepted interruptions from accident, and not a single instance is shown in which it was below the standard for a moment of that time, if it ever was, except when it was due to "accident," which means unavoidable causes.

For the errors noted in the instruction given for the defendant and in the refusal to set aside the verdict, as being against the evidence, the judgment will be reversed and the cause remanded.

Terre Haute and Indianapolis R. R. Co. v. Sidney B. McCord.

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1. **RAILROAD COMPANIES—*Insufficient Fences.***—A person owning pasture lands along the track of a railroad, is not required to keep his stock out of such pastures, because the failure of the company to keep its fences in repair makes it probable that such cattle may get upon the track.

2. **NEGLIGENCE—*Contributory, a Question for a Jury.***—Contributory negligence is a question of fact for the jury to determine, when there is evidence before them tending to prove it, which should be submitted to them for their consideration with proper instructions as to the law.

3. **SAME—*What Is Not Contributory.***—A farmer owning pasture land lying along a railroad track, to fence which, and to keep such fences in repair, is the duty of the company, and which duty it neglects, is not to be charged with contributory negligence because his cattle, kept in such pasture, get upon the track and are injured, although he was aware of the insufficiency of the fence.

Memorandum.—Action for injuring stock. In the Circuit Court of Edgar County, on appeal from a justice of the peace; the Hon. FERDI-

NAND BOOKWALTER, Judge, presiding. Trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 14, 1894.

APPELLANT'S BRIEF, T. J. GOLDEN AND J. E. DYAS,
ATTORNEYS.

Appellant contended that the owner of stock has no right to voluntarily permit his stock to stray upon the railroad track, through the known insufficiency of fences which the corporation are bound to maintain. C., B. & Q. R. R. Co. v. Seirer, 60 Ill. 295; Poler v. New York Central R. R., 16 N. Y. R. 476; Ill. Cen. R. R. Co. v. Middleworth, 43 Ill. 64.

H. VAN SELLAR and J. W. SHEPHERD, attorneys for appellee.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

This action was commenced before a justice of the peace against appellant for injury by its trains, to live stock of appellee, which got on its track through an insufficient fence between his pasture and its right of way. On the trial in the Circuit Court appellant offered no evidence, and conceded that it was bound to maintain the fence and had neglected its statutory duty in that behalf, but relied on the sole defense that "the conduct of appellee in putting his stock into a pasture from which he undoubtedly believed they would get onto the right of way, was such gross contributory negligence on his part as to constitute a bar to his recovery."

This defense was presented upon the following testimony of the plaintiff on his cross-examination: "Q. You knew of the condition of the fence, did you? A. Yes. Q. And still you kept your animals in there? A. Yes, sir. Q. You knew of their liability to get on the track through this fence? A. I thought they were liable. I had kept my stock out since the fence had been in that condition, but a man can't do that always. Q. It was necessary for the stock to be put in there to eat the pasture? A. Yes, sir; to get water and all these things."

While this shows he knew the condition of the fence, and feared his stock would get through, it does not prove beyond doubt that he knew or believed or thought it probable they would. His pasture contained about forty acres. All along the right of way the fence was up, made of posts and five wires, and without a gap. But it had been badly constructed, and in a bad condition for several years. The posts were set sixteen feet apart. Some were broken, many of the staples were rotted out and the wire swinging down. The one next to the top was broken at the place where the colt got out. It certainly afforded some protection to stock, but as certainly was not what it should have been for that purpose. How much of the time he had kept them out on that account does not appear, nor was it shown that any did get through it before June 24, 1893, when the colt was killed. Other animals, sheep and hogs, followed at intervals, July 29th, some time in August, and once afterward. It is therefore not a case of no fence, or substantially none, but only of an insufficient fence; not a case in which it was morally certain or even highly probable that stock would get through it by reason of its insufficiency, before it could be made sufficient by due diligence on the part of appellant, but only of manifest danger that they might. That danger impends at every moment in every case where there is any insufficiency, and yet no injury may be actually done.

There was nothing in the circumstances stated to impose on appellee any duty to appellant. He was not required on its account to make the fence sufficient—appellee was bound by its duty to itself and to the public, and by imperative command of the statute, to do that—nor to give it notice of the insufficiency, for it already had ample notice from other sources: the obvious condition of the fence, the length of time it had existed, and the daily passing and repassing along it by its agents and employes, charged with the duty to notice and repair it. The concession of its negligence is a concession of such notice. Nor was he required to follow it up with repeated requests or any request to repair it. Having such notice, by whatever means, the

statute was more than a request—a daily and constant command to repair it.

The claim is not that appellee contributed to the injury complained of by his omitting to do either of these things, but by his neglect of the duty to himself of taking ordinary care for the safety of his own property; and the only specification is that he put his stock in the pasture, or did not take it out and keep it out, notwithstanding his knowledge of the condition of the fence. No further circumstance tending to show negligence on his part appeared.

Contributory negligence is a question of fact for the jury to determine, where there is evidence before them tending to prove it; which should, therefore, be submitted to them for their consideration, with proper instruction as to the law. Here the court, by consent of the parties, gave his instructions orally; and from the very brief report of them found in the abstract, it does not appear that this question was submitted or in any way alluded to. If the conduct of appellee in the particular mentioned, amounted to such evidence, this omission was error which, if duly excepted to and found to be material, should reverse the judgment.

The question for our determination then, is whether this conduct of appellee, viewed in the light of the circumstances here shown, was proper to be submitted to and considered by the jury as evidence tending to show a want of ordinary care for his stock in the pasture, culpable negligence contributing to the injury that followed.

How could he have avoided it? No way has been suggested but that of taking and keeping them out until the fence should be made sufficient. But it was his pasture, and so far as shown the only lot on his farm of 140 acres from which they could get grass and water. His possession and use of it was in itself rightful, lawful, and doubtless highly convenient and valuable. To keep them out in order to avoid possible harmful consequences of appellant's negligence would clearly be to use not ordinary, but the highest degree of care, and yet to incur, perhaps, a greater risk of loss or as great as that so avoided. We know of no other except to keep a guard over them day and night—a measure

of care as extraordinary, unreasonable and impracticable as in the other case.

He could have given appellant notice in writing to repair the fence under the statute (Hurd's R. S., Ch. 114, sections 65-6), and so acquired the right to repair it himself if the company refused or neglected to do so within ten days; but he was not bound to exercise that right under the burden it imposed, and if he did it would not have avoided the danger, for within the ten days all the injury might be done.

We apprehend that with ordinarily prudent and careful farmers the adoption of either of these courses upon discovering mere insufficiency of the fence, is not the rule but the rare exception, and for some special reason, not appearing in this case; that they ordinarily do no more than give notice to the company and use some more watchfulness for any disposition of the stock to get out at the weak points, relying for the rest upon the liability of the company for the consequence of its negligence under the statute. What would be the rule if by any means there had come to be no fence, or substantially none, at any place in the line need not now be determined, nor do we mean to intimate any opinion upon that question. But where there is along the whole line what is in any proper sense a fence, though plainly insufficient, we are inclined to hold that for the bare fact that with notice thereof he allows his stock to remain there, the occupant of the pasture is not to be charged with such contributory negligence as should bar his right to recover for damages caused by that of the corporation in the premises. A different rule, it seems to us, would fall materially short of effectuating the intention of the legislature.

The occupant is apt to be among the first to notice any such insufficiency, and considering its importance and the many cases like this which must have occurred, it is somewhat remarkable that able and diligent counsel have found so few authorities thought to be in point upon the precise question here presented. Each of the three cited for appellant appears to us to be clearly distinguishable in principle from the one at bar.

I. & N. I. R. R. Co. v. Jones, 20 Ill. 221, did not arise under the statute, but, upon an agreement of the company, before the road was completed, to build a few rods of fence between its right of way and adjacent land of plaintiff on which he kept the sheep that were killed and injured. The road was built, but the fence was not. The cause of action alleged was not negligent mismanagement of the train, but the neglect to build the fence. It appeared, however, that if it had been built it would not have inclosed the lot nor prevented their getting on the track, because the plaintiff had not fenced the other sides, and as the court said, "there was no evidence to show that the animals got upon the railroad by the line the defendants were to fence, and the inference is as fair that they did not so get upon it as that they did." It was therefore held that his own failure to fence the other sides, leaving the sheep exposed "to destruction every hour in the day by trains running at their usual speed," was negligence, which "was the direct and proximate cause of the injury, and the defendants should have the benefit of that principle." Here the pasture would have been securely inclosed and the stock protected, if that part of the fence which the company did build, and was bound to keep sufficient, had been so kept, and the proof was that the animals did get on to the right of way through that insufficient part. The question here involved was, therefore, not touched.

In I. C. R. R. Co. v. Middlesworth, 43 Ill. 64, the declaration contained a count for negligence of the defendant in failing to fence their track, with a second and third for negligent management of the train. It appeared that plaintiff had a large herd of mules in a pen adjoining the roadway, one side of which was formed by the railroad fence, and they broke through that side. The Supreme Court held that the refusal of the following instruction was error:

"5. That although the defendant may have been guilty of negligence in the management of the train in question, yet if the plaintiff was also guilty of a want of proper and reasonable care and prudence on the occasion, by placing so many mules in an inclosure of the size stated, he knowing

the habits and disposition of the mules when frightened, then unless the proof shows that the conduct of the engineer was negligent, and not merely careless and imprudent, the law is for the defendant, and the plaintiff can not recover for the damage done."

From the report of this case it is not to be inferred that the railroad fence was in fact insufficient, or that any claim was made on the evidence under the first count, but that it might have been broken by the mules, though sufficient, and because so crowded into too small a pen and frightened. The instruction was directed against the claim under the other counts, for negligence in the management of the train. With reference to that claim, it was held proper that the jury should consider whether the plaintiff, knowing the habit and disposition of the animals in such circumstances, was not guilty of a want of ordinary care in so crowding them. Here the action is not for mismanagement of the train, but for negligence in failing to maintain a sufficient fence, and the charge is admitted. The only question is, whether the plaintiff was also guilty, in keeping his stock there with knowledge of its conditions, which the defendant knew as well, and in ample time, before the injury, to make sufficient.

In C., B. & Q. R. R. Co. v. Seirer, 60 Ill. 295, it appeared that some time before the injury complained of, the plaintiff's cattle had broken down a portion of the fence between the track and his pasture. Without notifying the company or any of its agents, he undertook to repair it, and in doing so, knowingly made and left it insufficient. He testified that the board he put in was a bad one, though it looked well enough; that he only tacked up the boards temporarily, and it was insufficient at that place to turn stock. With this knowledge, he permitted his stock to run where they were continually exposed to the danger of getting upon the track by means of this defective portion of the fence. The cow and steer in question did get through at that place and were killed. The court held it was his duty to notify, or make reasonable efforts to notify, the company of the defect in the

fence, unless he was prepared to show that it had notice, and if he volunteered to repair it, without attempting to give such notice, he was bound to use reasonable care and skill to make it sufficient. Having done neither, his loss was attributable to his own culpable negligence. They also quote approvingly the observation of Mr. Justice Selden in *Poler v. N. Y. Cent. R. R. Co.*, 16 N. Y. 76, that although the statute imposed upon the railroad company the absolute duty of maintaining fences, the proprietors along the road "have no right quietly to fold their arms, and voluntarily permit their cattle to stray upon the railroad track, through the known insufficiency of fences which the corporation are bound to maintain." But the court does not intimate that knowledge of its mere insufficiency, of which the corporation also has notice, would require them to abandon their adjoining pasture lands until it made them sufficient. If they give notice to the corporation, can it be said that they "quietly fold their arms?" In *Seirer's* case, it did not appear that the corporation had notice, but rather that it had not, and that the plaintiff himself, knowingly caused the defect by an act of negligence wholly distinct from the leaving of his cattle in the pasture.

It has been held that even where the owner suffers his cattle to run at large in violation of law, that fact does not, of itself, bar his right to recover of the railroad company for negligently killing it. *C. & St. L. R. R. Co. v. Woolsey*, 85 Ill. 370; *R. R. I. & St. L. R. R. Co. v. Irish*, 72 Id. 404. Here there was no act, fact or condition in addition to appellee's leaving his stock with knowledge of the insufficiency of the fence, such as it was, constituting negligence in itself or tending to show that his so leaving them was culpable negligence.

In *L. & N. R. R. Co. v. Dulaney*, 43 App. 297, plaintiff's mare got out of his pasture adjoining the defendant's right of way through the space that "should have been closed" by the gate "which the evidence showed could not be fastened and was utterly defective," as defendant had known for a long time before the injury. Presumably the plaintiff

also was chargeable with like notice, or he would not have been charged as he was with contributory negligence in allowing her to run in the pasture as he did. The court held that the jury were justified in finding as a fact that he was not guilty. What the court would have done in case the jury had found differently there was no occasion to say. From the expression that the mare escaped "through the space that should have been closed by the gate" it may, perhaps, be inferred that it was entirely open, which might make it a question of negligence for the jury. But we are inclined to hold broadly, as beforestated, that where there is really a fence, and not a mere pretense of it, though so insufficient as to be liable to be breached by stock that is not breachy, and the company had notice of it, the rightful occupant of the land may leave his stock there, putting the risk of loss by neglect to make it sufficient upon the company on which rests the duty to make it so; in other words, that merely leaving them there is not negligence nor evidence of negligence on his part which a jury should be allowed to consider. The law should not and does not, in our opinion, oust him nor permit a jury to oust him of the valuable use of his own land for that cause, in such a case. Judgment affirmed.

**Chicago & Alton R. R. Co. v. Jennie Du Bois, Administra-
trix of Wm. L. Du Bois.**

1. **MASTER AND SERVANT—Duty of Master as to Machinery, etc.**—The intention of the law is that machinery or appliances provided by the master for the use of his employes, shall be as safe as ordinary care, prudence and skill can make it.

2. **SAME—Where the Master Manufactures the Machinery.**—If the master manufactures the machinery, the law imposes upon him the legal duty of exercising ordinary and reasonable care and diligence to produce a machine that will be safe for the use of the servant, and also charges him with the further duty of using the like degree of skill, care and diligence in keeping it in such repair that it will be safe.

3. *SAME—Master Not an Insurer.*—The master is not held as an insurer that the machinery is safe, or even reasonably so, but only that he has used reasonable care, skill and diligence to make and keep it safe.

4. *SAME—Notice of Defects in Machinery.*—A servant can not recover of his employer for any injury caused by a defect in machinery without showing that the master had knowledge or by the use of reasonable diligence might have had knowledge, of the defect.

5. *JUDGES—Improper Remarks.*—On the trial of an action for damages sustained by reason of the explosion of a boiler, counsel objected to a witness because he had not been shown to be an expert; the court said: "Experts, like all other witnesses, are only entitled to credit after they bring themselves within the rule, for what it amounts to; I would rather take some men's opinion on the subject than twenty experts after he brings himself within the rules. Then the question is what weight the jury will give to his opinion." *Held* that the remark improperly encroached upon the province of the jury.

6. *INSTRUCTIONS—Invading the Province of the Jury.*—An instruction which invades the province of the jury by assuming to advise them that if certain recited facts are proven, they are required by the rules of law to find that employes of a railroad company in constructing an engine did not discharge their duties with reasonable and ordinary skill and care, is improper.

Memorandum.—Action for damages; death from negligence in constructing machinery. In the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding. Declaration in case; plea, not guilty; trial by jury; verdict for plaintiff; appeal by defendant. Heard in this court at the May term, 1894. Reversed and remanded. Opinion filed December 21, 1894.

WILLIAM BROWN and WILLIAMS & CAPEN, attorneys for appellant.

FRANK B. McKENNAN and T. C. KERRICK, attorneys for appellee.

MR. JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

William L. Bu Bois, a locomotive engineer, was killed while in the employ of the appellant company by the explosion of the boiler of a locomotive engine, which he was operating on its railroad.

This was an action brought by his administratrix under the statute to recover the damages resulting from his death to his widow and next of kin.

Judgment in the sum of \$5,000 was rendered against the company for which it has prosecuted this appeal.

The appellee rested the right of recovery upon two charges of negligence. (1) That certain servants of the company employed by it to construct the engine, negligently built the inside sides of the fire box of the boiler of the engine out of sheets of steel which had been damaged and deteriorated in point of thickness, strength and quality, and allowed to rust to such an extent as to render them unfit and insufficient for that purpose, and that such sheets or plates of steel by reason of the great heat to which they were afterward subjected and the alleged defects therein before mentioned, became cracked "in different places, so that though such cracks were repaired by 'plugging,' the sheets were greatly weakened and rendered insufficient to withstand the pressure of the steam, and that the explosion occurred in consequence thereof." (2) That a number of bolts called "stay bolts," designed to strengthen and hold the sides of the fire box of the boiler firmly in place, and to further enable the sheets of steel of which the box was composed to resist the pressure of the steam upon them, had become and were broken at the time of the explosion, and that the explosion was caused thereby.

The theory of the appellee was that a sheet which composed the right hand inside side of the fire box gave way under the pressure of the steam and that the explosion was the result thereof.

The appellant company insisted that the explosion was not so caused, but that it was occasioned by the failure of the deceased to discharge his duties as engineer with reasonable skill and care in that he neglected to keep the boiler of the engine properly supplied with water, and that the explosion was caused by superheated steam generated in consequence of such neglect. The engineer, fireman and head brakeman were the only persons on the engine and all of them were killed.

The appellant company was forced to rely upon the testimony of expert witnesses to support its theory as to the cause of the explosion.

These witnesses examined the fragments of the boiler and coincided in the opinion that the explosion occurred because the boiler was insufficiently supplied with water.

They also testified that the appearance of the top sheet (called the crown sheet) of the fire box of the boiler indicated that it was red hot and bare of water when the explosion occurred, and that the initial point of the explosion was in the boiler just above the front part of this crown sheet and not at the side of the fire box, as appellee claimed.

The appellee sought to support her theory by the testimony of witnesses as to the construction of the engine and also by the opinion of witnesses who examined pieces of the engine after the explosion. The engine was built in 1889, by the appellant company in its shops at Bloomington. The explosion occurred February 2, 1892. While it is alleged in the fourth count of the declaration that the boiler was not, when constructed, furnished with a sufficient number of stay bolts, and that those that were furnished were placed too far apart, yet it is not contended by the appellee that the charge was sustained by the proof. The proof to the contrary was ample. The contention of the appellee as to the stay bolts now is that the fact that a number of them subsequently became broken, and by reason thereof the sides of the fire box of the boiler were not sufficiently supported, and that such bolts were broken, was, or by the exercise of ordinary care might have been, known to the appellant company. The appearance of pieces of broken bolts found after the explosion was relied upon to support the charge that a great number of them were broken at time of and before the explosion.

There was much conflicting testimony as to the appearance of these broken parts of the bolts and many variant opinions expressed by different witnesses who gave testimony as experts as to the proper conclusion to be drawn therefrom. Whether such bolts were broken before, or were broken by the explosion, was left in much doubt.

It is not improbable that some were broken before the boiler exploded, for it appeared in the evidence that such bolts are liable to break at any time when an engine is run-

ning upon the road and that for this reason every engine when built is supplied with an excess of bolts in order that it may be safe, though some are broken. The rule adopted by boiler makers is to put in each engine a sufficient number of stay bolts to resist at least three times the pressure to which the boiler is to be subjected when the engine is in use. That rule was observed in the construction of this engine. As before said the company was not derelict in the matter of equipping the engine with stay bolts.

The intention of the law is that machinery or appliances provided by the master for the use of the employe shall be as safe as ordinary care, prudence and skill will make it. .

If the master manufactures the machinery the law imposes upon him the legal duty of exercising ordinary and reasonable care and diligence to produce a machine that will be safe for the use of the servant, and also charges him with the further duty of using the like degree of skill, care and diligence in keeping it in such repair that it will continue to be safe. Woods on Railroads, Vol. 3, Secs. 373-375; Shearman & Redfield on Negligence, Secs. 87-92; Weber Wagon Co. v. Kehl, 139 Ill. 644.

The master is not held as an insurer that the machinery is safe or even reasonably so, but only that he has used all reasonable care, skill and diligence to make and keep it safe.

"A servant can not recover of his employer for an injury caused by a defect in machinery, without showing that the master had knowledge, or by the use of reasonable diligence might have had knowledge of the defect." E. S. and Provision Co. v. Hightower, 92 Ill. 139.

Therefore, when the engine itself was completed and put in use upon the road, it became incumbent upon the appellant company to use reasonable care and diligence to have and keep it supplied with such a number of sound bolts that it would be safe from the dangers of explosion.

If it discharged that duty, liability to respond in damages to the appellee can not be predicated upon the charge of negligence in the matter of the stay bolts.

It appeared from the evidence that monthly inspection for broken stay bolts was deemed reasonably prudent and safe by boiler makers, engineers and others competent to speak from experience upon that question, and that examinations at such periods were a general rule and custom.

It further appeared from testimony that was not contradicted that one Matthew Owens, a boiler maker of forty years' experience, and his assistant, while in the discharge of their duties as employes of the appellant company, examined the engine in question for broken stay bolts not more than eight days before it exploded. Owens went into the boiler and with the aid of his assistant, who remained on the outside, subjected the bolts to the "hammer test," which is conceded to be the best test to ascertain if any bolts are broken. Owens testified that they completed the work, and when that was done "there was not a broken stay bolt in the boiler." No reason appeared for discrediting the competency of this witness to perform this work or his truthfulness as a witness. If his statements were not untrue, the appellant company was not legally chargeable with negligence in respect of its duty as to the stay bolts.

In proper time it required a competent and experienced workman and an assistant to subject the bolts to the best test known in order to discover if they were whole and sound. They discharged the task faithfully and to the best of their skill and judgment.

Nothing more could be required when only reasonable and ordinary prudence and care is demanded.

So it seems clear the judgment can not rest upon the charge that the explosion occurred because the company failed to discharge its duty with reference to the stay bolts of the engine.

If supported at all, it must be upon the ground that the company negligently built the inside side of the fire box out of rusted and insufficient and defective sheets of steel.

The appellee introduced but two witnesses, Jesse King and Christian Ayersman, who testified upon that point. The testimony of King, it may be conceded, was fully in support of the position of the appellee.

But Ayersman testified that he worked on the sheets of steel that went into the inside side of the fire-box and that they were of first class material. He stated that the "connection sheet" was made of a rusted sheet of steel, but insisted that it was not injured by the rust. As to the sheets used in making the inside sides of the fire-box he directly contradicted King.

Four witnesses, John M. Holland, foreman of appellant's force of boiler-makers, George Gregg, foreman of its shops, Arthur Hayes, forgerman, and Frederick Hayes, who hammered all the rivets and stay bolts in the boiler, were introduced in behalf of the appellant company. Holland testified that he selected the sheets of steel that were put into the sides of the inside of the fire-box when the engine was built and worked them over inch by inch; marked out the places where holes for the stay bolts should be made; and that not a single defective sheet was used. Hayes testified that he went over all parts of each inside and outside sheet that went into the fire-box and riveted all the stay bolts; that he saw no sheet that was rusted and damaged, but all were in good condition. Gregg testified that he had charge of the construction of the engine; that he saw the sheets; saw them drilled for the stay bolts and that they all appeared to be in first class order; all first class sheets. Hughes testified that he saw the sheets before they went into the boiler and saw them "rolled" and put in shape and that they appeared to him to be perfect in every particular. These witnesses for the appellant, four in number, and Ayersman, a witness for the appellee, in all, five, directly contradicted King as to the character and quality of the sheets used in making the sides of the fire-box.

His means of knowing as to the particular matter about which they all testified, was not superior in any respect to theirs; and we are aware of no sufficient reason why his statement should have been given greater weight than that of five other witnesses. True, four of them were in the employ of the appellant company—the other, Ayersman, was not—but it was also true that King had been in its employ,

but he engaged in a strike in 1892 and the company refused to allow him to return into its service. Ayersman was not an employe of the appellant company, and the appellee introduced him in her behalf as a witness worthy of credit and entitled to be believed. We are unable to perceive why or upon what theory the jury were justified in giving greater weight to the testimony of King than to that of so many other witnesses. They may have been inclined to that end by an error which occurred in the course of the trial of the cause, which, for that reason, will now be noticed.

Jesse King, the witness in behalf of the appellee, to whom we have just referred, was proceeding to give his opinion to the jury as to the cause of the explosion, when counsel for the appellant company interposed an objection upon the ground that it had not been shown that he was competent to testify as an expert. The court said: "Let him tell, he is a boiler maker."

Counsel for appellant said: "This witness has not shown that he is an expert witness."

The court replied as follows:

"THE COURT: Experts, like all other witnesses, are only entitled to credit after they bring themselves in the rule, for what it amounts to; I would rather take some men's opinion on the subject than twenty experts, after he brings himself in the rule. Then the question is, what weight the jury will give to his opinion."

This remark carried to the jury the information that the court placed a low estimate upon the testimony of expert witnesses, and that it was the judgment of the court that the opinion of some men who were not experts, was entitled to more weight than the opinions of twenty who were. The court had immediately before declined to rule directly whether King was competent to testify as an expert, but directed that he could proceed to express his opinion. The inference likely to be drawn by the jury was that the opinion held by King was proper for their consideration, whether he could bring himself within the rule as an expert or not, and there is much reason to fear that

the jury would accept, as a necessary further inference, that King was one of the "some other men," whose opinion was, in the judgment of the court, entitled to as much or more weight than that of twenty experts. The probable effect was not only to discredit, in advance, the expert witnesses subsequently introduced by the appellant in support of its defense, and to unduly enhance the opinion expressed by King as to the cause of the explosion, but a further possible effect was to impress the mind of the jury with the conclusion that the testimony of King as to the character and quality of the steel used in the fire box of the boiler ought to be accepted by them as entitled to more weight than the testimony of five other witnesses, who, as we have seen, testified in opposition to him on that question.

The credibility of witnesses and the weight to be given their testimony are matters exclusively for the judgment of the jury. The remark of the court improperly encroached upon the province of the jury and may have entered into their deliberations and controlled their action. That the cause of the appellant company may have been thereby greatly prejudiced, can not be denied.

The appellant company has complained that other errors intervened, but, in view of the fact that the matters complained of, except as to one hereafter noticed, are not likely to again occur, it seems to us only necessary that we should give attention to but that one of such alleged errors.

The court, at the request of the appellee, gave to the jury the following instruction:

"6. The court instructs you that if you believe from the evidence that the locomotive in question was constructed in the shops of the defendant, and that in the construction of the same, there was used by or with the knowledge and consent of defendant, or any of its officers or agents who had charge of the construction of said locomotive, steel plates that had been permitted to rust, and in consequence thereof to deteriorate in strength, whereby said plates became and were insufficient and improper to be used for the purpose aforesaid, and that afterward, in consequence of such defective plates, if the jury believe from the evi-

dence that they were defective, the said engine exploded, and by such explosion killed William L. Du Bois, husband of complainant, while he was exercising ordinary care for his own safety, then the jury should find the issues for the plaintiff."

We have seen that the obligation imposed by law upon the appellant company was that in building the engine it should use reasonable and ordinary skill and care to make it safe for the use to which it was to be devoted and that a failure to exercise that degree of care constituted negligence in law. Whether such degree of care was used was a question of fact. The instruction invaded the province of the jury by assuming to advise them that if certain recited facts were proven they were required by the rules of law to find that the servants of the company who constructed the engine did not discharge their duties with reasonable and ordinary care or skill. The jury should have been advised as to the degree of skill and care demanded by law of the workmen who build the engine, and left free to determine from the facts disclosed by the evidence whether such workmen were negligent or not.

It was disclosed by the evidence that it was not uncommon to find rust upon pieces or sheets of iron or steel intended for use in building engines and other machinery, and that usually the metal was in no sense injured thereby. It was obviously the duty of those engaged in building the engine to examine the material they were about to use in order to ascertain that it was fit and sufficient for the purpose to which it was proposed to devote it. The law did not demand that they should reject a sheet of steel or bar of iron because rust was found upon it. The law had no rule about it. It only demanded that they should be competent to judge of the quality and fitness of the material, and should carefully inspect it and exercise reasonable skill, care and judgment to ascertain whether it was fit and sufficient to be used. If they were so competent, and did so proceed with the required degree of skill and care, they fulfilled the law and are not to be denounced as negligent, a consideration which escaped the notice of the court when passing upon this instruction.

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If the instruction had declared that the workmen should be deemed negligent if it appeared that they used sheets of steel which they knew were deteriorated in strength and rendered insufficient from the effect of rust, it might have been sound as a proposition of fact, but it was unsound, both in law and fact, to declare them conclusively guilty of negligence if they used steel that had rust upon it and so affected it as to render it insufficient, for the reason that the controlling question whether the injury to the metal could have been discovered by the exercise of reasonable vigilance, care and skill is left wholly out of consideration.

In view of the errors of law we have pointed out, and the unsatisfactory condition of the evidence, we are driven to the conclusion that the motion of the appellant company for a new trial should have been sustained.

The judgment must be, and is, reversed and the cause remanded.

Samuel Schofield v. The Village of Hudson.

1. CITIES AND VILLAGES—*Passage of Ordinances—Ayes and Nays.*—An entry upon the official record of the proceedings of the board of trustees of a village incorporated under the general law as follows: "Board met at call of president. Members present—Gastman, Cox, Dement, Stater, Wallace and Miller. Minutes of previous meeting read and approved. Motion made and carried that the resolution declaring the village of Hudson duly incorporated under the laws of the General Assembly be entered upon the record of the said village. New ordinances Nos. 1, 2, 3 and 10 were adopted and passed by the board. Motion made and carried to adjourn"—is not sufficient to show the legal passage of ordinance No. 3.

Memorandum.—Action for violation of a village ordinance. In the County Court of McLean County, on appeal from a police magistrate; the Hon. C. D. MEYERS, Judge, presiding. Trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1894, and reversed. Opinion filed October 29, 1894.

APPELLANT'S BRIEF, J. J. MORRISSEY AND HARVEY HART,
ATTORNEYS.

Municipal corporations exercise only delegated and limited powers, and in the absence of statutory authority to

56	191
174s	445
56	191
108	202
56	191
204s	502

that effect, courts are authorized to indulge in no presumptions in favor of the validity of their ordinances. *Schott v. People*, 89 Ill. 195; *Steckert v. City of East Saginaw*, 22 Mich. 104; *Tracy v. The People*, 6 Col. 151.

The ordinance of the village of Hudson, relied upon, is invalid and not admissible in evidence. *R. S.*, Chap. 24, Art. 3, Sec. 13; *Spangler v. Jacoby*, 14 Ill. 297; *The People v. Starne*, 35 Ill. 121; *Prescott et al. v. Board of Trustees et al.*, 19 Ill. 323; *Ryan v. Lynch et al.*, 68 Ill. 160; *Burritt v. Comrs. of State Contracts*, 120 Ill. 322; *People v. De Wolf*, 62 Ill. 253; *Steckert et al. v. City of East Saginaw*, 22 Mich. 104; *Tracy v. The People*, 6 Col. 151; *Town of Olin v. Meyers*, 55 Iowa 209; *Los Angeles Gas Co. v. Toberman*, 61 Calif. 199; *City of Logansport v. Crockett*, 64 Ind. 319.

Where the law requires the facts essential to the passage of an ordinance to be stated in the journal of the enacting body, if such facts are not set forth the conclusion is that they did not occur. When a contest arises as to whether an ordinance has been passed, the journal is the evidence of the action of the enacting body, and by it the ordinance must stand or fall. *Rich et al. v. City of Chicago*, 59 Ill. 286; *Spangler v. Jacoby*, 14 Ill. 297; *Ryan v. Lynch et al.* 68 Ill. 160; *Burritt v. Comrs. of State Contracts*, 120 Ill. 322; *Steckert et al. v. City of East Saginaw*, 22 Mich. 104; *Tracy v. The People*, 6 Col. 151; *Town of Olin v. Meyers*, 55 Iowa, 209; *Los Angeles Gas Co. v. Toberman*, 61 Calif. 199; *Morrison, Admx., v. City of Lawrence*, 98 Mass. 219; *City of Logansport v. Crockett*, 64 Ind. 319.

APPELLEE'S BRIEF, KERRICK & SPENCER, ATTORNEYS.

Our Supreme Court has expressly held that upon the passage of ordinances it is not necessary for it to appear of record that the ayes and nays were taken, that the statute in that regard is not mandatory. *Barr v. The Village of Auburn*, 89 Ill. 361. In that case the journal entry was as follows: "On motion of William Brownell the following ordinance (the one in question,) was unanimously adopted." The journal also showed that five out of

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six members were present when the board met, that other business was transacted, and then the ordinance in question was passed. In the case at bar the journal showed that all the members of the council were present. At that time village boards of trustees had but six members. Revised Statutes, Secs. 185, 190, and 193, Chap. 24.

A recital that the ordinance was passed by the board is equivalent to a recital that it was passed by a majority of the members-elect of the board, to say the least. In this case where it is shown that all the members-elect were present, we contend that the recital that the ordinance was passed by the board means that it was voted for by all the members of the board. The expression "adopted and passed by the board" leaves no room for inference that a less number than a majority of the board voted for the ordinance, whereas the expression "unanimously adopted" might only mean that there were no negative votes, that is to say, that all who voted, voted the same way, or with unanimity. The language does not exclude the inference that some who were present might not have voted at all, but in the case at bar all the members elect being shown to be present, that is to say, the board in its entirety being present, and the board being declared by the journal to have adopted and passed the ordinance, the ordinance must of necessity have received at least a majority of the votes of all the members elect. The word "board" can not mean less than a quorum, and a quorum in the absence of some statutory provision to the contrary, can never mean less than a majority. *Bouvier Dict.*, Vol. 2, p. 407; *Barker v. Allen*, 5 H. & N. 61; *Broadwell et al. v. The People*, 76 Ill. 554; *Hughes et al. v. The People*, 82 Ill. 78.

Our Supreme Court is not alone in holding that it is not necessary that the ayes and nays appear upon the journal. *Brewster v. Davenport*, 51 Ia. 427; *Eldora v. Town of Burlingame*, 62 Ia. 32; *State v. Vale*, 53 Ia. 550; *In re Mount Morris Square*, 2 Hill (N. Y.) 14; *Elmdorf v. Mayor of New York*, 25 Wend. (N. Y.) 693; *Lexington v. Headly*, 5 Bush (Ky.) 508.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

Judgment below was rendered against appellant for a penalty of \$3 for a violation of an alleged ordinance concerning animals running at large, and the sole question here is whether the supposed ordinance was duly passed.

The statute requires that the village board "shall keep a journal of its own proceedings," that "the yeas and nays shall be taken upon the passage of all ordinances * * * which shall be entered on" it, and that "the concurrence of a majority of all the members elected shall be necessary to the passage of any such ordinance." R. S., Ch. 24, Art. 111, Secs. 12, 13. But Sec. 8 declares that a majority of those elected shall constitute a quorum to do business.

The journal entry respecting the ordinance in question is as follows:

"HUDSON, March 14, 1888.

Board met at call of president. Members present, Gastman, Cox, Dement, Sater, Wallace and Miller. Minutes of last meeting read and approved. Motion made and carried that the resolution declaring the village of Hudson duly incorporated under the laws of the General Assembly be entered upon the record of the said village. New ordinances numbers 1, 2, 3 and 10 were adopted and passed by the board. Motion made and carried to adjourn, to meet tomorrow, March 15, at one o'clock P. M.

GEORGE W. GASTMAN, President.

IRA BARSBY, Village Clerk."

New ordinance number 3, therein mentioned, is the one here considered.

Doubtless the chief object in requiring the vote in such cases to be taken by yeas and nays and recorded, was to make it certainly appear that a majority of all the members and not merely of a quorum concurred in the passage of the proposed ordinance, though another and proper one may have been to show who voted, and how, and who failed to vote, if any, on the question of such passage.

Nor is there any doubt that the requirement is impera-

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tive; but whether a strict literal compliance is required is not clear from decisions of other States as to like provisions. In *Barr v. The Village of Auburn*, 89 Ill. 361, a record not in literal compliance was somewhat doubtfully held sufficient by a majority of the court, and positively denied by one member. There, the entry on the journal, after giving the name of one member of the board as the only absentee, stated that the ordinance was passed "unanimously;" and the court held it sufficiently showed, though only by implication, that the other five were present and concurred in the affirmative vote. Thus it identified those so voting, and showed that they constituted a majority of all the members elected, as matter of fact and not of opinion or understanding, which is the full and precise effect of a vote by yeas and nays.

We would therefore feel bound, in a like case, to do likewise.

Here, though all six of the members are named as being present at the meeting, it is not stated in any form of expression that they voted unanimously. Thus it entirely fails to show, with reasonable certainty, that the vote was taken by yeas and nays, or that all or any certain member voted in any other manner, or how any particular number voted.

It is said that this expression, in connection with the statement of the members present, clearly imports or implies that as many as four concurred. We think the journal entry does not of itself so import or imply. From the entry, with the laws making six the full number and requiring the concurrence of a majority of all elected, and the further presumption that the board and the clerk complied with this requirement, such would be the inference. But whether they did so comply, is the very question in issue, upon which the burden of proof was on the village throughout the case, and the evidence was the journal entry. To presume that the law was complied with, is to shift the burden and beg the question. Upon this reasoning an entry stating that six, five or four members were present, and that the ordi-

nance was passed, would suffice, though simply and wholly ignoring the statute, which imperatively requires a record showing with reasonable certainty who voted for its passage and that they constituted a majority of all the members elected.

It is apparent from the opinion in the Barr case that the word "unanimously" was what saved the ordinance, and hardly saved it. Nothing tantamount to it appears here, and we are of opinion that by the material difference thus shown, the evidence here falls short of what is required. The judgment will therefore be reversed.

56 196
155 511

**Springfield Consolidated Ry. Co. v. John Welsch, by
Emma Shoenel, Guardian, etc.**

1. EVIDENCE.—*Statements of Employes and Agents.*—In an action for personal injuries against an electric street railroad company, a statement by the motorman while the car yet stood on the person of the plaintiff, that he did not stop the car because he could not reverse it, is properly admitted in evidence as a part of the *res gestæ*.

2. POLLING THE JURY—*The Right—When to be Exercised.*—The right of polling the jury is absolute, if sought to be exercised before they are allowed to separate after returning their verdict. After the jury are allowed to separate, the right is gone.

3. CARE AND CAUTION—*By Persons Under the Age of Maturity.*—The law only requires a minor to use such care and caution as is ordinarily used by one of his age and capacity. The capacity and discretion of a child of the age of seven years, is a matter fully within the common knowledge and experience of all, and jurors may consider it without direct proof as to the degree thereof.

Memorandum.—Action for personal injuries. In the Circuit Court of Sangamon County; the Hon. ROBERT B. SHIRLEY, Judge, presiding. Declaration in case; plea, general issue; trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1894, and affirmed. Opinion filed October 29, 1894.

STATEMENT OF THE CASE.

The appellant company operated a line of electric street railway cars in Springfield. The plaintiff, a child about seven years of age, while endeavoring to escape from three

or four dogs that were chasing him, in his fright, ran upon the track of appellant road in that city, and was struck by one of its cars, and seriously and permanently injured. He recovered in this, an action on the case, a judgment against the appellant company in the sum of \$2,500, to reverse which, this appeal was prosecuted. The recovery was predicated upon alleged acts of negligence of the defendant's servant, viz., that the servants of the company in control of the cars, did not exercise ordinary care to discover the plaintiff as he approached the track, in his efforts to avoid the dogs; that said servants did not warn him of the approach of the car, and did not, after they had discovered that he was in danger, exercise ordinary care and prudence to stop the car. Special findings adverse to the appellant company as to each of the alleged grounds of negligence were returned by the jury, together with a general verdict that the defendant was guilty, and assessing the damage of plaintiff at \$2,500.

WILSON & WARREN and PALMER, SHUTT & DRENNAN, attorneys for appellant.

SCHNEPP & BARNES and CONKLING & GROUT, attorneys for appellee.

MR. JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

A number of witnesses were examined by the respective parties and much conflicting testimony elicited. The insistence of counsel for the appellant company that the injury to the child was the result of pure accident was not without support. There was also proof to maintain the case for the plaintiff. Special interrogatories propounded to the jury directed their minds to the particular charges of negligence contained in the declaration of the plaintiff, and demanded of them that they answer specifically whether such charges had been established by the proofs. The answer sustains each charge of negligence so made. The case is not, to our minds, a clear and satisfactory one, but a thorough investigation of the testimony preserved in the record has brought us to the conclusion that we would not

be justified in holding that the verdict was manifestly against the weight of the evidence. The court properly allowed the plaintiff to prove that the motorman in control of the car at the time, said after the injury had been inflicted, but while the car was yet upon the plaintiff, that he could not reverse the car, and that was the reason that he did not stop it. The statement of the motorman was proper to be given in evidence as part of the *res gestæ*. Quincy Horse Car Co. v. Gruse, 137 Ill. 264. It is true the declaration did not charge that the injury was due to insufficient or defective machinery or appliances by which the car was controlled, but the statement of the motorman tended to sustain the contention of the appellee, that the motorman saw the boy in time to have stopped the car, had he used ordinary care to do so, a point that was vigorously combated by the appellant. Moreover the special finding of the jury shows that the general verdict was based upon the acts of negligence averred in the declaration, and not upon an inference arising from the statement of the motorman, that the machinery or appliances of the car were faulty. The verdict was returned into open court and the jury discharged in the cause in the absence of the appellant or its counsel. Two days after, and while the members of the jury were yet in attendance upon the court as jurors, counsel for appellant moved the court to be allowed to poll the jury. The court denied the motion which is relied upon as error. The absence of appellant or its representative from the court when the verdict was returned was not explained or excused, nor is the propriety of the action of the court in receiving the verdict at the time questioned. The right of polling the jury is absolute if sought to be exercised before they are allowed to separate after returning their verdict. Here the jurors had been for two days exposed to outside influences which might have operated to induce dissatisfaction with the verdict. We find nothing in the record to indicate that any juror had become dissatisfied and are clearly of the opinion that the court had not power to cause the jury to be polled. *Bigg v. Cook*, 4 Gilm. 336; *Bond v. Wood*, 69 Ill. 282.

Dwelling House Ins. Co. v. Garner.

We do not think the first instruction given for the appellee declared negligence as matter of law from the existence of facts recited, or that it indicated that presumptions of negligence arose in law therefrom. There was, we think, evidence sufficient to authorize the court to instruct the jury, as was done in the second instruction, that "the law only required that the plaintiff should use such care and caution as is ordinarily used by one of his age and capacity." It was proven that the plaintiff was seven years of age. This of itself tended to show his capacity. The capacity and discretion of a child of such tender years is a matter so fully within the common knowledge and experience of all that jurors may consider it without direct proof as to the degree thereof. In the case of *C. R. & J. R. R. Co. v. Ensinger*, 114 Ill. 83, cited as condemning this instruction, the age of the plaintiff was not proven, and it was for that reason the court held the evidence did not warrant the instruction. We find no error demanding the reversal of the judgment. It is affirmed.

**Dwelling House Insurance Company, of Boston, Mass., v.
Addison Garner.**

1. *INSURANCE—Policy, When Rendered Void by Other Insurance.*—The object of the clause in an insurance policy by which other insurance works a forfeiture, is to prevent the moral hazard arising from excessive insurance, and is met only by such insurance as the insured has knowledge of and regards in force during the continuance of the risk, and which is calculated to affect his motive for the preservation of the property, and not by insurance which afterward becomes effective merely because of a subsequent acceptance which could not affect such motive.

Memorandum.—*Assumpsit.* In the County Court of Vermillion County; the Hon. JOHN G. THOMPSON, Judge, presiding. Declaration on policy of insurance; pleas, general issue and special pleas. (1) That at time of insurance by defendant there was other insurance upon property destroyed without any agreement therefor being added to or indorsed upon

said policy. (2) That subsequent to the issuing of said policy, plaintiff, without consent indorsed upon or added to said policy, procured other insurance upon the property alleged to have been destroyed. Trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 14, 1894.

APPELLANT'S BRIEF, W. R. LAWRENCE AND HARBERT & DALEY, ATTORNEYS.

It is universally held that where a policy provides against other insurance, the existence of other insurance in violation of that provision will render the policy void, and the mere recital in the proof of loss of the other insurance is sufficient evidence of its existence. *Continental Ins. Co. v. Hulman*, 92 Ill. 145; *New York Central Ins. Co. v. Watson*, 23 Mich. 488.

PENWELL & LINDLEY, attorneys for appellee.

MR. PRESIDING JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This was an action on a fire insurance policy. The plaintiff recovered a judgment for \$450.

The defense was other insurance, contrary to the terms of the policy.

It appeared that the plaintiff had previously held a policy in the North-Western National Insurance Company covering his dwelling and a machine barn which contained some machinery.

That policy was payable in case of loss to a mortgagee therein named. A fire occurred by which the machine barn and contents were destroyed, and after some negotiation that loss was adjusted.

Afterward, and before the machine barn was rebuilt, but while it was in course of rebuilding, the plaintiff was solicited to insure in the appellant company, and the policy in suit was issued upon the new machine barn and the contents of same. The application stated, among other things, that there was no other insurance written by the agent of

Dwelling House Ins. Co. v. Garner.

appellant, upon the plaintiff's statement that there was insurance on his dwelling and contents, but nothing else.

Afterward, without plaintiff's knowledge, the North-Western National Company policy, which covered his residence and the machine barn, which had burned, was renewed by the agent (of said North-Western National Company) who was also representing the mortgagee, and still later this renewed policy was handed to plaintiff, and the premium was paid in a settlement between the agent and the plaintiff by a deduction from an account for brick furnished by plaintiff to the agent. The plaintiff, who was an illiterate man, did not know that the machine barn was covered by the last named policy until after the loss now in suit, but having learned it, he preferred a claim against the North-Western National, and was paid, after a suit brought, the *pro rata* sum for which that company was liable.

It is not argued that the policy now involved was vitiated by the fact that another policy covering the same property was afterward issued without the knowledge or authority of the plaintiff, but that his acceptance of the benefits of such policy amounted to a ratification of the act of the agent in renewing it and worked a forfeiture of the present policy the same as though it had been issued with his knowledge and consent in the first place. The object of the clause by which other insurance shall work a forfeiture is to prevent the moral hazard arising from double and excessive insurance.

In *May on Insurance*, section 365c, the author, after stating the inharmonious views of different courts upon the meaning and effect of such clauses, says: "The real test is the condition of the insured's motive for the preservation of the property. If he thinks he has double insurance the very evil the company intended to avoid exists."

The converse must also be true, that if he is not aware of the other insurance his motive for the preservation of the property can not be unfavorably affected thereby. This is aside from the question of the validity of the other insurance, which has by many courts been considered important.

Here the insured was not aware of the other insurance until after the fire, and the moral hazard was, of course, not increased, nor, in a technical sense, was the other insurance effective during the continuance of the risk, so far as he was concerned, because it was unknown, and the minds of the insurer and the insured had not met in regard to it.

It did not become effective until after the fire, when, for the first time, it was known to the assured and accepted by him.

Whether, after the loss, he could accept and so bind the insurer need not be discussed; but assuming that he could, as was conceded by the insurer's recognition and payment of his claim, the point is whether the appellant can be heard to say that such acceptance related back to the issuance of the policy and made it effective during the continuance of the risk within the purview and meaning of the clause in question.

We are inclined to hold that considering the object of this clause it is met only by such insurance as the assured knows of and regards as in force during the continuance of the risk, and which is calculated to affect his motive for the preservation of the property, and not by insurance which afterward becomes effective merely because of a subsequent acceptance, which could not affect such motive.

By another clause in the policy, the appellant was not liable for more than its proportion of all the insurance, whether valid or not, that might be on the property. No doubt this provision would lead, perhaps require, the assured to accept the benefit of another policy of which he had no knowledge before the loss, because whether valid or not it would reduce the amount to be collected upon this policy. An acceptance under such stress of conditions so induced by the terms of the policy of the appellant should not be urged by appellant as relating back, for the purpose here sought.

The judgment will be affirmed.

Carrie C. Van Frank et al. v. The United States Masonic Benevolent Association.56 203
158a 560

1. **BENEFICIARY ASSOCIATIONS—*Failure to Pay Assessments—Declaration of the Insured.***—A failure to pay the assessment renders the certificate void. As the member has the power to change the beneficiaries as well as to terminate the whole matter by failing to pay assessments and defeat the expectation of the beneficiary, his declaration is competent to show that he has done so.

2. **SAME—*Records, Proof of Assessments—Notice.***—The record of the making of an assessment by a beneficiary association is *prima facie* evidence of the fact.

Memorandum.—Assumpsit. In the Circuit Court of Adams County; the Hon. OSCAR P. BONNEY, Judge, presiding. Declaration on a certificate of a beneficiary association; pleas, general issue and special plea; trial by jury; verdict and judgment for defendant; appeal by plaintiff. Heard in this court at the May term, 1894, and affirmed. Opinion filed October 29, 1894.

APPELLANTS' BRIEF, J. C. BROADY AND J. F. CARROTT,
ATTORNEYS.

A forfeiture of the nature relied upon by the defendant in this case is a matter of strict legal right, and the defendant, in order to assert it, must abide inflexibly by the terms of its contract. *Metropolitan Acc. Asso'n v. Windover*, 137 Ill. 417.

A certificate of insurance in a mutual benefit association is *prima facie* evidence of the member's good standing at and after the time it was issued, and in an action on such certificate the burden is on defendant to show that the member had lost such standing at the time of his death. *Mulroy v. Sup. Lodge K. of H.*, 28 Mo. App. 463; *Forse v. Sup. Lodge K. of H.*, 41 Mo. App. 106.

In an action on a mutual benefit insurance certificate, where forfeiture on the ground of non-payment of an assessment is relied on as a defense, and non-payment of such assessment has been proven, the burden is still on defendant company to show that the assessment was regularly and

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properly levied according to its laws. *Demings v. Supreme Lodge K. of P.*, 14 N. Y. S. 834.

APPELLEE'S BRIEF, CLARK VARNUM, ATTORNEY.

All the contracts of a mutual insurance association or company are made with reference to all the laws of the organization, and such laws, whether contained in the charter or by-laws, are deemed a part of each contract of membership and are binding on all members. *Supreme Lodge K. of P. v. Knight*, 117 Ind. 489; *Bogards v. Farmers' Mut. Ins. Co.*, 79 Mich. 440; *Insurance Co. v. Barstow*, 8 R. I. 343; *Commonwealth v. Insurance Co.*, 112 Mass. 142, 112 Mass. 116; *Insurance Co. v. Gachenbach*, 115 Pa. St. 492; *Training School v. Insurance Co.*, 18 Atl. Rep. 392; *Shaw v. National Ben. Association*, 7 N. Y. Supp. 287; *Sands v. Shoemaker*, 4 Abb. App. Dec. 149; *Planter's Insurance Co. v. Comfort*, 50 Miss. 62; *Bersch v. Insurance Co.*, 28 Ind. 64; *Holland v. Chosen Friends*, 25 Atl. Rep. 367.

The mutual rights of members of mutual benefit associations, whether voluntary or corporate, depend upon the constitution and by-laws, which have the effect of a contract, whose provisions are binding upon all. *Bauer v. Sampson Lodge K. of H.*, 102 Ind. 262; *Maderia v. Merchants' Exchange Society*, 16 Fed. Rep. 749; *Karcler v. Knights of Honor*, 137 Mass. 368; *Penfield v. Skinner*, 11 Vt. 296; *Treadway v. Hamilton*, 29 Conn. 68; *Walsh v. Ætna, etc., Ins. Co.*, 30 Iowa 145; *Mitchell v. Lycoming Mut. Ins. Co.*, 51 Pa. St. 402; *Brewer v. Ins. Co.*, 14 Gray (Mass.) 203.

Members of mutual benefit companies also, are conclusively presumed to know what the laws of the organization are, and must act accordingly. See cases above cited, and also *Pfister v. Gerwig*, 222 Ind. 567; *Coleman v. Knights of Honor*, 18 Mo. App. 189; *Coles v. Ins. Co.*, 18 Iowa 425; *Fugure v. Mut. Society of St. Joseph*, 46 Vt. 368; *People v. St. George Society*, 28 Mich. 261; *Sperry's Appeal*, 116 Pa. St. 391; *Osceola Tribe v. Schmidt*, 57 Md. 98; *Belleville Ins. Co. v. Van Winkle*, 12 N. J. Eq. 335; *Hanf. v. N. W. Masonic Aid Association*, 45 N. W. Rep. 315; *Hood v.*

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Hartshorn, 100 Mass. 117; Roe v. Williams, 97 Mass. 163. Davenport v. Ins. Co., 10 Daly 535; Canal Co. v. Coal Co., 50 N. Y. 250; Lafond v. Deems, 81 N. Y. 507; Hudson v. McCartney, 33 Wis. 331; Herrick v. Belnap, 27 Vt. 673; U. S. v. Robeson, 9 Pet. (U. S.) 319; Trott v. Ins. Co., 1 Cliff. (U. S.) 439; Vincy v. Bignold, 20 Q. B. Div. 172.

The record of the proceedings of the defendant association is competent evidence. Owings v. Speed, 5 Wheat. (U. S.) 420; Bagley v. A. O. U. W., 131 Ill. 498.

It is not necessary for defendant, in order to justify the making of an assessment, to prove that members had died, or that they were in good standing, or that the necessity for an assessment existed; the record of the association is *prima facie* evidence of these facts. Bagley v. A. O. U. W., 131 Ill. 498.

The evidence of the conversation between Jasper and the member, G. H. Van Frank, was competent, because Van Frank, under the articles of incorporation of the defendant association, was the owner of the certificate and had the right to change the beneficiary at pleasure, or to pay up his assessments or not, as he chose. Hansen v. Knights of Honor, 140 Ill. 301.

MR. PRESIDING JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This action was brought upon two certificates of membership to Gerrit H. Van Frank, issued by the appellee.

The appellants were the beneficiaries named in the certificates, and the said Gerrit H. Van Frank having died they sought to recover the indemnity provided by said certificates. The defense was that the said Gerrit had failed to pay the assessments of September, 1891, for \$8.80. The case was tried by jury and the verdict was for defendant. Judgment was entered accordingly, from which this appeal is prosecuted.

By the express terms of the certificate, as well as the applications therefor, a failure to pay assessments rendered the certificates null and void.

There can be no doubt that the defense was made out by competent proof.

The record showing the assessment was introduced and it appeared that notice thereof in proper form was duly mailed to Mr. Van Frank.

The record was full *prima facie* proof of the assessments (Bagley v. A. O. U. W., 131 Ill. 498), and the mailing of the notices was, under the provisions of the certificates, all that was necessary to show on this point. The defendant went further, however, and proved personal service of the notice, and the declaration of Van Frank that he did not intend to pay the assessment. No objection to this proof was made at the trial, but it is now insisted that such declaration was incompetent as against the beneficiaries. Waiving the failure to object at the proper time, and that without this proof the defense was amply made out, we are of opinion that as Van Frank had the power to change the beneficiaries, as well as to terminate the whole matter by failing to pay assessments and thus defeat the expectation of the beneficiaries, that his declaration was competent to show that he had done so. Hansen v. Supreme Lodge K. of H., 140 Ill. 301. The objection that the notice, which was of date September 1st, was actually mailed a day or two sooner, is without force.

Assessments were made six times a year, September 1st being one of the fixed dates, and each assessment was for the losses occurring during the two months preceding.

How the fact that the notice was sent a day sooner than necessary could invalidate what was so done is not apparent.

Much complaint is made in the brief as to the action of the court in reference to numerous instructions asked by the plaintiffs and refused, as well as to some given at the instance of the defendant.

We shall not undertake to consider the points thus presented for the reason that upon the proof the verdict could not have been for the plaintiffs. The defense was perfectly clear. Such being the case, we ought not to reverse the judgment, even though technical error might be found in the rulings of the court as to instructions. The judgment will be affirmed.

CASES

IN THE

APPELLATE COURTS OF ILLINOIS

SECOND DISTRICT—DECEMBER TERM, 1893.

56	207
164	213

58	207
92	593

James Dinsmoor v. Benjamin Bressler.

1. **ATTORNEYS—Failure to Turn Over Moneys Collected for Estates.**—An attorney at law employed by an administrator to collect money for an estate, who fails and refuses to turn over the money collected by him after demand, may be proceeded against under Section 81, Ch. 3, R. S., entitled "Administration of Estates."

2. **SAME—Embezzlement by.**—In this State money collected by an attorney for his client is not the property of the attorney in such manner that he is not guilty of embezzlement if he appropriates it to his own use.

3. **SAME—Failure to Turn Over Moneys—A Criminal Offense.**—Our statute treats an attorney, in respect to moneys collected by him for a client, and which he fails to turn over on demand, the same, in a criminal point of view, as a justice of the peace, clerk of a court, or other person authorized by law to collect money, and subjects him to punishment as an embezzler, and disqualifies him from practicing his profession.

4. **SAME—An Agent for the Collection of Claims.**—The statute recognizes an attorney at law as a mere agent for the collection of claims intrusted to his charge, and in case of his refusal to pay over moneys collected by him for his clients, he may be debarred from practicing his profession.

5. **PRINCIPAL AND AGENT—Money in the Hands of the Agent.**—Money of the principal in the hands of an agent is still the money of the principal, and the agent has no right to use it, or pay it out for his own private purposes, and while he has the money he is not technically the creditor of his principal, but his trustee.

6. **LIENS—Of Attorneys for Fees.**—An attorney has no lien except what is called a general or retaining lien upon papers or documents, etc., which he receives professionally.

7. **TRUSTEES—Employment of Persons—Personal Liability.**—A person employed by a trustee to render services in collecting claims due the trust estate, without the order of court, when the trustee does not profess to undertake to create a lien on the estate, and he is not insolvent, and does not stipulate against his personal liability, can not proceed against the trust estate in equity to recover compensation for his services. In such cases he must look to the trustee or to his estate, in case of his death, and not to the successor of the trustee employing him, or to the trust estate.

8. **APPELLATE COURT PRACTICE—Exceptions.**—Where there is no bill of exceptions showing that exceptions were taken to the rendition of the judgment and finding of the court, only the exception that appears in the record of the judgment, the appellant can not assign error on such record except as to the form of the judgment.

9. **EXCEPTIONS—Where it is Error to Award.**—A proceeding under Secs. 81 and 82, Chap. 8, R. S., entitled "Administration of Estates," is not a suit at law or in equity in the sense of the right of the successful party to recover judgment and obtain execution. The power of the court is to make such order in the premises as the case may require and to enforce obedience to its order by attachment, but it is erroneous to award exception.

Memorandum.—Appeal from an order made by the Circuit Court of Whiteside County, the Hon. JOHN D. CRABTREE, Judge, presiding, in a proceeding under Sec. 81, Chap. 8, R. S., entitled "Administration of Estates." Heard in this court at the December term, 1898. Opinion filed May 22, 1894. Opinion on rehearing, filed January 8, 1895.

JARVIS DINSMOOR, attorney for appellant.

APPELLEE'S BRIEF, V. S. FERGUSON AND JOHN G. MANAHAN,
ATTORNEYS.

Attorneys in this State have no lien except on their client's papers, and none on money collected by them. *Sanders v. Seelye*, 128 Ill. 631; *Forsythe v. Beveridge*, 52 Ill. 268; *Humphrey v. Brown*, 46 Ill. 476; *La Framboise v. Grow*, 56 Ill. 197; *Nichols v. Pool*, 89 Ill. 491.

Transactions with the administrator create no lien on the estate, but only a personal liability of the administrator. *Johnson v. Leman*, 131 Ill. 609.

Dinsmoor v. Bressler.

Even the administrator can not personally allow claims so as to bind the estate. *Walker et al. v. Diehl*, 79 Ill. 476.

Attorneys have not only no lien against the estate for services rendered the administrator, but even no claim therefor against the estate. *Barker v. Kunkel*, 10 Brad. 407.

MR. JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This was a proceeding commenced before the County Court by appellee by citation against appellant. Commenced under Sec. 81 and 82 (80 and 81) Hurd's Revised Statutes, 1891, Chap. 3, page 222.

The appellee stated under oath before the County Court, in an affidavit filed therein in the manner provided by statute, that the First National Bank of Morrison paid James Dinsmoor and Jarvis Dinsmoor, acting attorneys for the estate of said Abram Ulmer, deceased, the sum of about \$1,030, belonging to the said estate; that out of said sum affiant was informed that Dinsmoors paid the sum of about \$300 on the award of Nancy Ulmer; that the remainder of said sum, to wit, about \$730, said Dinsmoors retained in their possession, and they refused to pay the same to affiant as such administrator of the estate of Abram Ulmer, deceased, although often requested so to do by the affiant. The affiant therefore prayed for a citation as required by the statute.

The citation was issued accordingly and served on both parties, and on the 10th of October, 1892, a hearing was had before the County Court, resulting in finding that James Dinsmoor had received the \$1,030 from said bank, as alleged, and had not paid any of it out, and ordered him to pay over to appellee the said sum within ten days; and that appellee have execution therefor, and the proceeding as to Jarvis Dinsmoor was dismissed. The appellant perfected an appeal to the Circuit Court. In the Circuit Court the appellant moved to dismiss the proceeding for want of jurisdiction of the Probate Court, of the subject-matter, which motion was overruled by the court, and exception entered on the record by appellant.

Then the appellant moved the court to transfer the case to the chancery side of the docket, which was overruled by the court, and exception taken by appellant on the record.

On the 5th day of June, 1893, the Circuit Court heard the case, and found that James Dinsmoor had in his hands the sum of \$700, belonging to said estate, and ordered that he pay appellee for the use of said estate the sum of \$700, within twenty days from that date, and that in default of such payment, appellee have execution therefor, and that appellant pay the costs of the proceeding to be taxed. To the making of such order the appellant excepts, as is shown by the order, but not in the bill of exceptions.

Section 81 of the statute under which this proceeding was had, reads as follows:

"Sec. 81. If any executor or administrator, etc., * * * shall state upon oath, to any County Court, that he believes that any person has in (his) possession, or has concealed or embezzled, any goods, chattels, moneys or effects, books of account, papers, or any evidence of debt whatever, etc., * * * the court shall require such person to appear before it, by citation, and may examine him on oath, and hear the testimony of such executor or administrator, and other evidence offered by either party, and make such order in the premises as the case may require." This act was approved March 19, 1873, and takes the place of the former act. R. S., 1845, p. 556, Sec. 90.

Sec. 82. "If such person refuses to answer any interrogatory as may be propounded to him, or refuses to deliver up such property or effects, or in case the same has been converted, the proceeds, or value thereof, upon a requisition being made for that purpose by an order of such court, such court may commit such person to jail until he shall comply with the order of court therein."

It is insisted by appellant that the facts set out in the affidavit filed by appellee, precedent to the issuance of the citation, does not show a case wherein the County Court, or the Circuit Court, on appeal, had jurisdiction to proceed by citation under the above sections of the statute:

First. Because the Probate Court can not adjudicate concerning a contract between client and attorney, and because an attorney has a lien on the money collected, for his fees, and the County Court can not adjudicate that matter.

Second. The County Court has no power to order an execution, and neither had the Circuit Court on appeal.

Third. It is insisted that proceeding under the statute can be only in cases where an action of replevin or trover would lie, and would not be where a party proceeded against did not have the money in specie. The following cases are cited: *Williams v. Candy*, 20 Ill. 643; *Wade v. Prichard*, 69 Ill. 279. The question arises in this case whether an attorney at law, employed by an administrator to collect money for an estate of these parties, who fails and refuses to turn over any money collected by him as such attorney, after demand by the person entitled to the same, can be proceeded against under said section 81 of the above recited statute. It seems to us there can be no doubt of the power to thus proceed against such attorney in such manner. Any one, according to the terms of the statute, who has "embezzled" any "moneys" or other goods or chattels, may be proceeded against under the statute by citation. In this State, however otherwise it may have been at common law, money collected by an attorney at law for his client, is not the property of an attorney in such manner as that he is not guilty of embezzlement if he appropriate it to his own use.

Our statute treats an attorney at law, in respect to the moneys he collects for his clients and fails to turn over to them on demand, the same in a criminal point of view as justice of the peace, clerk of the court or other person authorized by law to collect money, and subjects him to punishment as an embezzler to fine and imprisonment in the county jail and disqualifies him from practicing his profession ever after in this State. Sec. 79, Chap. 38, R. S. The statute recognizes such an attorney as a mere agent for the collection of claims intrusted to his charge, and in case of his refusal to pay over moneys collected for his clients he may be debarred from practicing his profession in this

State. Sec. 7, Chap. 14, R. S. In *Blair v. Sinnott*, 134 Ill. 78, it was held that "money of the principal in the hands of an agent is still the money of the principal, and the agent has no right to use it or pay it out for his own private purposes." Further the court uses this language: "While he has his money he is not technically the creditor of his principal but simply his trustee. It is in such case, therefore, always the legal presumption that the money in the hands of the agent is the identical money that he received, and he will not be heard to allege his embezzlement or breach of trust to escape a liability arising from that presumption. Mechem on Agency, Sec. 785; Story on Agency, Secs. 229, 230; Trustees v. McCormick, 41 Ill. 323; Colton v. Halliday, 59 Ill. 170." We think this case falls within the statutory jurisdiction so far as the subject-matter of the claim is concerned. By the court, in *Blair v. Sinnott*, *supra*, it was also held that the statute contemplates not only moneys, etc., placed in the hands of the party charged, but such as comes to his hands after the deceased's death. And we see no reason why the language of the statute does not cover cases where the goods, chattels, moneys, etc., were placed in the hands of the party charged by the administrator himself.

The language of the statute is that the oath of the administrator need only show that the party charged had goods, moneys, etc., in his possession belonging to "a deceased person, *i. e.*, belonging to the estate of a deceased person."

It is not necessary to show when, and the law does not require proof as to the time such property came into the possession of the person charged.

We think, therefore, the affidavit showed sufficient facts to give the County Court jurisdiction.

The appellant insists that he had the right of offset for attorney's fees rendered in the collection of the claim on which the money was collected, and other attorney fees.

It appears that an attorney has no lien in this State except what is called general (or retaining lien) on papers, documents, etc., which he receives professionally, but he has

no charging (or special lien). The right of lien on what has been recovered through his professional services has been denied him in this State in several cases. *Sanders v. Seelye et al.*, 128 Ill. 631, and cases cited.

Again, a person employed by a trustee and the appellee as administrator, acted as such in employing appellant to collect the claim in question, to render services useful to the trust estate without the order of court, when the trustee does not profess to undertake to create a lien on the estate and he is not insolvent, and does not stipulate against his personal liability, can not proceed against the trust estate in equity to recover compensation for his services. In such case he must look to the trustee or to his estate in case of his death, and not to the successor of the trustee employing him or to the trust estate. *Johnson v. Lemon et al.*, 131 Ill. 609; *Barker v. Kunkel*, 10 Brad. 407, and authority cited.

The appellant makes several points arising on the evidence and argues against its sufficiency.

We are of opinion that no such objection can be raised under the state of the record as it appears in this court.

There is no bill of exceptions showing that any exceptions were taken to the rendition of the judgment and finding by the court, only exception appears in the record of the judgment. The appellant can not assign error in this court on such record, except as to the form of the judgment, and, possibly, what may be defective in the affidavit filed as the basis and jurisdiction of the proceedings. *James v. Dexter*, 113 Ill. 654; *Parsons v. Evans*, 17 Ill. 238; *Mfg. Co. v. Horton*, 74 Ill. 310; *Harris v. People*, 130 Ill. 463. Whether this proceeding was in law or equity, or neither, is probably immaterial for the purposes of this discussion. The same rule in regard to the presumptions in favor of the orders and decisions of the County Court where it has jurisdiction of the persons of the parties and subject-matter of the litigation, prevails as in the Circuit Court. The County Court has no chancery jurisdiction. The Circuit has only such jurisdiction as the County Court possesses. *Blair v. Sinnott*, *supra*. But we think neither the County nor Circuit Court

had any jurisdiction to order an execution against the appellant. The case at bar is not a suit at law or equity in the sense of the right of appellant to recover judgment and obtain execution. The statute under which this proceeding is had, directs in what manner the administrator may have the right to enforce the order of the court. Section 81 provides that the court may "make such order in the premises as the case may require."

Section 82 provides the manner of enforcing the order and proves that in case the party charged shall refuse, after the order is entered requiring it to deliver up the subject of the order, that the "court may commit" such person to jail until he shall comply with the order of the "court therein." There is an entire omission to give power to award execution. That did not appear to be in the contemplation of the act, and it being a statutory remedy it should not be implied.

This is analogous to the rule in case of settlement of guardians' accounts, under order of court, to pay over balance to the ward. Such order can be enforced only by attachment. *Kingsberry et al. v. Hutton et al.*, 140 Ill. 603. In this case the only proper way to enforce an order to pay over the money to appellee would be by attachment; and it would be erroneous to award an execution in the order.

The judgment of the Circuit Court, as to the order awarding execution against the appellant is reversed, and the order awarding the appellant to pay over the money named in the order, and time and manner specified therein, and the order for costs against appellant therein and the entire order, except as above specified, is affirmed.

It is further ordered that the costs of this appeal be taxed against appellee to be paid in due course of administration. Judgment reversed in part and affirmed in part.

OPINION ON REHEARING, PER CURIAM.

Irrespective of the question as to whether appellant's rights were saved to object to the finding of the court below on the evidence without saving an exception in a bill

of exceptions to the rendition of the judgment, we are constrained to hold on the evidence the court below was justified in finding appellant retained the sum of money belonging to the estate mentioned in the order.

Appellant's claim of set-off consists of supposed attorney's fees rendered in collecting the money claimed in this citation, also for personal services performed as attorney for appellee and others and settlement. As shown in the former opinion, an attorney has no lien on money collected for his client as a collecting fee, but only on papers placed in his hands as retaining fee. *Sanders v. Seeley*, 128 Ill. 631. Nor can he obtain a lien on a trust estate, like the one in question, of which the appellee is administrator and trustee, as before stated. *Johnson v. Leman*, 131 Ill. 609; *Booker v. Kunkle*, 10 Brad. 407.

The statute referred to in the opinion herein filed, authorizing criminal proceedings to be instituted, and citation to Supreme Court against an attorney who embezzles the money of his clients collected by him after demand and tendering his fees and costs, does not aim to create a lien for fees in favor of the attorney, but simply does not allow him to be prosecuted criminally until his fees are paid.

The statute was cited to show that an attorney had no title to the money collected for his client, but that he held it as trustee only. The appellant introduced evidence tending to show settlement between himself and appellee, and that the estate money was diverted to payment of claims other than those legitimately allowable against the estate.

While we do not think such a settlement could be allowed to stand, appellant knowing the estate money was being misappropriated, yet the court found against him on that issue, which we do not feel justified in disturbing.

This court has heretofore held that exceptions to judgments in this class of cases must be preserved by bill of exceptions to authorize an appellate court to review cases on questions of fact raised by the evidence. *Seavy v. Seavy et al.*, 30 App. R. 625.

The petition for a rehearing in this case is denied.

Asad Udell and Malachi Quigley v. Ira Slocum.

1. **APPEARANCE**—*Entry of, in Replevin Suit—Waives Affidavit and Process, When.*—When a person becomes a party defendant to a suit pending in replevin and voluntarily enters his appearance, he waives the filing of an affidavit as to him, and the issuing of a writ and service thereof.

2. **ACTIONS**—*Change in Form, Pending Suit.*—The action of replevin when the property is not found may be changed to trover.

3. **VERDICT**—*When for the Plaintiff by Direction of the Court.*—Where there is such a failure of proof on the part of the defense that a verdict based upon it can not be allowed to stand, a court may properly direct the jury to find for the plaintiff.

4. **CHATTEL MORTGAGES**—*Mortgagee May Maintain Replevin or Trover for Possession.*—Where a mortgage provided that if a distress warrant should be levied upon the property the debt should, at the option of the mortgagee, become due, and he should have the right to take immediate possession, and the property is seized upon a distress warrant, the mortgagee may demand the same, and if possession is not delivered to him, he may maintain replevin for it or trover for its conversion.

5. **REPLEVIN**—*Demand and Grounds of Refusal.*—Where a demand is made upon a defendant in a replevin suit, prior to its commencement for the property, if he refuses to deliver the property upon the ground that he has no longer possession of it, he must put his refusal upon that ground so that the plaintiff may know where to look for his property and not be misled to his injury.

6. **SAME**—*Demand of an Agent.*—Where property sought to be replevied is in the possession of an agent, a demand upon the agent is sufficient to bind the principal.

Memorandum.—Replevin and trover. In the Circuit Court of McHenry county, on appeal from a justice of the peace; the Hon. CHARLES KELLUM, Judge, presiding. Trial by jury; verdict for the plaintiff by direction of the court; appeal by defendants. Heard in this court at the December term, 1893, and affirmed. Opinion filed May 22, 1894.

APPELLANTS' BRIEF, JOHN B. LYON, ATTORNEY.

Appellants contended that the affidavit in replevin is jurisdictional. *Evans v. Benton*, 85 Ill. 579; *Stolberg v. Ohnmacht*, 50 Ill. 442; *McClaghry v. Cratzenbergh*, 39 Ill. 117; *Kehoe v. Rounds*, 69 Ill. 352.

A mortgagor of chattels has an interest in the property mortgaged that may be seized and sold, and a person mak-

56	216
68	141
56	216
77	309
56	216
81	555
179	122

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ing a levy on such goods is not a trespasser, and neither replevin in the *cepit* nor trespass will lie against him, his levy and possession thereunder being lawful. *Durfee v. Grinnell*, 69 Ill. 371; *Pike v. Colvin*, 67 Ill. 227; *Merritt v. Niles*, 25 Ill. 282; *Beach v. Darby*, 76 Ill. 479; *Spaulding v. Mozer*, 57 Ill. 648.

A demand and refusal is no evidence of a conversion when the thing demanded is not in the possession or under the control of the person demanded of. *Hill v. Belaseo*, 17 Brad. 195; *Addison on Torts*, 399; *Race v. Chandler*, 5 Brad. 553.

Before recovery can be had in trover or replevin it is necessary to prove either that the defendant acquired possession of the property wrongfully, or that he had it under his control and refused to surrender it on demand. *Woodard v. Woodard*, 14 Ill. 466; *Goff v. Harding*, 48 Ill. 148; *Boyden v. Frank*, 20 Brad. 169.

APPELLEE'S BRIEF, C. P. BARNES, ATTORNEY.

"A court may permit amendments to be made to the extent of discontinuing the action as to any joint plaintiff or joint defendant, and changing the form of action so long as any one or more of the original plaintiffs and defendants remain parties to the action." *Meyer et al. v. Wilshire*, 92 Ill. 395; *Douglass v. Newman*, 5 Brad. 518; *Citizens' Gas Light and Heating Co. v. Granger & Co.*, 118 Ill. 277; *McDowell v. Town et al.*, 90 Ill. 359.

The proof is conclusive that a demand was made on Udell, and that he was the agent of Quigley, and was still acting in that capacity after this suit was commenced. Wells on Replevin, Sec. 379. Had the seizure been lawful, we submit the demand would have been sufficient, and Udell would still be liable in trover with Quigley for the value of the property. *Ring v. Billings*, 51 Ill. 475. Had appellant's taking of the property been lawful, and their possession rightful, still by contesting appellee's right to the property, and attacking his mortgage, they waived the necessity of any demand. *Brumer v. Dyball*, 42 Ill. 36; Wells on Replevin, Sec. 374.

MR. JUSTICE CARTWRIGHT DELIVERED THE OPINION OF THE COURT.

This suit was commenced by appellee in replevin before a justice of the peace against Asad Udell, one of the appellants, for the recovery of a horse, two colts, seven calves and a lumber wagon. The writ was personally served, but the property was not found. The justice rendered judgment for plaintiff for \$146, damages and costs, and the defendant appealed to the Circuit Court, where, on motion of the plaintiff, the appellant Malachi Quigley was added as a party defendant. Said Malachi Quigley entered his appearance at the September term, 1890, and the cause was continued from term to term until the January term, 1893, when he entered his motion to dismiss the suit as to him because no affidavit in replevin had been filed against him. The plaintiff made a cross-motion to change the form of the action to trover. The cross-motion was sustained and the motion to dismiss overruled, and this action of the court is complained of. The right to change the form of a pending action of replevin to trover is conceded, but it is claimed that no action was pending against Quigley for want of an affidavit. Jurisdiction had been acquired by the filing of an affidavit to issue the writ against Udell, and when Quigley was made a co-defendant with Udell he voluntarily entered his appearance to the action, thereby waiving the issuing of a writ against him and service thereof. If an affidavit would have been necessary to the issuance of a writ against him in the first instance, he had waived it by waiving the writ and entering his appearance. The action was pending, and if an affidavit was necessary for any purpose it could have been filed at any time, and the change to trover obviated any such necessity.

A trial was had and the court directed the jury to return a verdict for the plaintiff, which was done accordingly, and the damages were assessed at \$160. Plaintiff remitted \$14, and judgment was entered for \$146 damages and costs.

The facts appearing on the trial were as follows:

On December 15, 1889, James Donnelly was the tenant

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of the defendant Malachi Quigley, and the owner of the property in controversy, and other personal property and crops on the farm occupied by him. The plaintiff was the holder of a mortgage for \$200 on the property in controversy, and had consented that it should be sold with other property at a farm sale that Donnelly had advertised for that day, and plaintiff was to take sale notes to the amount of his mortgage for the property sold. Donnelly was indebted to Quigley to the amount of \$135, for rent, and Quigley issued his warrant to the defendant Udell, directing him to make distraint to that amount. Udell went to the farm and levied on property of Donnelly and stopped the proposed sale. Donnelly claimed the exemption allowed to the head of a family. On the next day, December 14th, Udell filed his distress warrant with an inventory of the property levied on in the office of a justice, who issued a summons against Donnelly returnable December 19th, and the summons was personally served. Donnelly having made a schedule of his property, Udell proceeded to have an appraisement, and Donnelly having made his selections, Udell, on December 18th, took the property in controversy and removed it from the farm. Judgment was rendered December 19th, by default against Donnelly for \$135 rent and costs. Plaintiff demanded the property in controversy through an agent from Udell, who refused to surrender it, and this suit was commenced December 26, 1889. The general defense relied upon was that the mortgage under which plaintiff claimed was fraudulent and void, but there was no evidence in support of that defense which would require submission of that question to the jury. There was such a failure of proof on that issue that a verdict based upon that defense could not be allowed to stand.

Udell defended on the ground that his levy was lawful when made and that he had parted with the possession of the property before the plaintiff as mortgagee had exercised his option to take possession of the mortgaged property and made demand for such possession. The mortgage provided that the mortgagor might retain possession of the

property until default in payment of the note therein mentioned, which was not due at the time of the levy or demand, and that if the mortgagee should feel insecure or unsafe, or if, among other contingencies, any distress warrant should be levied on the property, the debt should, at the option of the mortgagee, become due, and he should have the right to take immediate possession of the property and sell it as therein provided for the satisfaction of his debt, rendering the overplus, if any, to the mortgagor. Donnelly therefore had an interest in the mortgaged property which was subject to levy under the distress warrant, and Udell was not a trespasser in making the levy. But the plaintiff had a right to demand the property, and on a refusal to surrender it, would have a right to maintain replevin for it or trover for its conversion. *Pike v. Colvin*, 67 Ill. 227; *Durfee v. Grinnell*, 69 Ill. 371; *Simmons v. Jenkins*, Admr., 76 Ill. 479.

When the demand was made upon Udell for the property, he said that he would consider that the demand was made, but that he could not deliver the property. The refusal was general, and was not shown to have been placed upon the ground that he did not have possession of the property. On the trial, he claimed that after having taken the property, he turned it over to one Thomas Quigley, as an agent for the defendant Malachi Quigley. The plaintiff was present when Udell levied on the property, and Udell had afterward taken it from the farm. It was not shown that anything had occurred to afford information to the plaintiff that Udell's relationship to the property or to the defendant Quigley had changed or ceased. If a change, known to Udell, but not to the plaintiff, had taken place in the possession of the property, the latter had a right to be informed of it, and if not informed, he had a right to suppose that Udell still had possession. If the refusal to surrender was upon the ground that he had parted with the possession, he should have put it on that ground, so that the plaintiff might learn where to seek the property and not be misled to his injury. *Wells on Replevin*, Sec. 381. Having failed to speak when fairness required it, and having given an un-

qualified refusal to surrender the property, we do not think that he should now be permitted to offer the change of possession to another agent as an excuse. If that were allowed, then, in case the second agent, Thomas Quigley, were sued after a demand on him, it might turn out that the property had secretly passed to some other agent of Malachi Quigley. The agency having existed, and the plaintiff having no notice, either in fact or from the circumstances, of any revocation, he had a right to treat it as still existing. 2 Kent Com., 644; Story on Agency, Sec. 470.

The special defense of Quigley was, that no demand for the property was made upon him. If Udell was in possession of the property as the agent of Quigley, and holding it by authority of his principal, the demand upon the agent would be sufficient. Cobbey on Replevin, Sec. 484; Wells on Replevin, Sec. 375; Deeter v. Sellers, 102 Ind. 458; Under the evidence, the plaintiff had the right to treat that relation and condition as existing, and therefore the defense was not available.

The action of the court was justifiable and the judgment will be affirmed.

Illinois Central Railroad Company v. Henry H. Stassen, Admr., etc.

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94	*187

1. **ORDINARY CARE**—*What is Not an Exercise Of.*—A person who voluntarily stands in close proximity to a railroad train passing at the rate of thirty or forty miles an hour, is guilty of negligence.

2. **SAME**—*Voluntary Exposure, etc.*—A party who voluntarily exposes himself to a known danger, assumes the risks, and is barred from a recovery for an injury resulting from it.

Memorandum.—Action for damages; death from negligent act. In the Circuit Court of Will County; the Hon. DORRANCE DIBELL, Judge, presiding. Declaration in case; plea of not guilty; trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the December term, 1898, and reversed. Opinion filed May 22, 1894.

H. M. SNAPP, attorney for appellant.

C. W. BROWN, attorney for appellee.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

On the 6th of August, 1891, Frederick Engelke, one of a section gang of six or seven men engaged in leveling up the track on appellant's railroad, three miles south of the station of Monee, was struck by a large piece of coal, falling from the tender of a passing train, and killed. Appellee, as administrator, brought an action on the case against appellant, and recovered damages to the amount of \$3,000.

There are two counts in the declaration. The first charges that the lump of coal which struck and killed Engelke was thrown from the engine or tender by an employe of the railroad company in charge of the engine. The second charges that the employes in charge of the engine negligently permitted the coal to remain upon the tender and engine in such a loose and insecure manner, that while the train was passing it was thrown by the speed of the train from the tender and struck Engelke.

The evidence shows that deceased had been in the service of appellant, as a section hand on the Monee section, for about twelve years. The duties of the gang required the men on and about the track constantly. Twenty or thirty trains per day passed over that portion of appellant's road. The falling of coal from passing trains was of frequent occurrence.

Members of the same gang to which Engelke belonged, testified to seeing lumps of coal often cast from rapidly moving trains, and that not only coal but pieces of iron, wood and other articles could be seen scattered along the track. Engelke's long experience was sufficient to advise him of the danger of standing near rapidly passing trains. Not only so, but he, with others of the gang, had been cautioned by the foreman, John Elstone, that it was dangerous.

At the time Engelke was killed the men were engaged at

a small cut on the road. The banks were about eight feet above the track with a graded slope, to a small ditch lying on either side of the track. The passing train was the Bloomington passenger on its way to Chicago. The foreman saw it approaching when two miles away and signaled his men to get off the track. Three of them left the track on the east side, crossed the ditch and went up the bank. Engelke, the foreman, and another man left the track on the west side. The foreman and the other man crossed the ditch and stood partly up the bank. Engelke took a position in the ditch close to the track, his head being about four feet lower than the top of the tender. While standing there he was struck. Elstone, the foreman, is the only one who witnessed the accident. He testified that he saw the coal leave the edge of the tender and strike Engelke. He was not able to say how the coal left the tender, but he was watching the engine and thinks if there had been any one in the tender at the time he would have seen him. The only persons upon the engine at the time were the engineer and fireman. Both deny upon oath, that they threw the coal from the tender, or know by what means it left the tender and struck Engelke.

The jury returned a special finding that Engelke was struck by coal thrown from the engine by an employe in charge of the train. There is a total absence of evidence on which to base such a finding. The denial of the engineer and fireman coupled with the testimony of Elstone satisfies our minds that the lump of coal was cast from the tender by the speed of the train. There are instances in which counter-vailing circumstances may outweigh the positive testimony of three witnesses but this is not one of them.

In this case the circumstances are not inconsistent with the testimony of these witnesses. It is not unreasonable that a train moving at the rate of thirty or forty miles per hour could cast off from the tender a large lump of coal with sufficient force to kill a man.

We are of the opinion that Engelke was not at the time of the accident in the exercise of ordinary care. Had he exer-

cised the same care that was exercised by the other men of his gang he would have avoided the injury. He voluntarily stood in the ditch, in close proximity to the train, instead of crossing it and moving up the bank as the others did, and as common prudence would seem to dictate. A party who voluntarily exposes himself to a danger he knows of, assumes the risks and is barred a recovery for an injury resulting from it. Such voluntary exposure is incompatible with the exercise of ordinary care for one's own safety. Where an employe voluntarily takes an extra hazardous position, aware of the dangers attending it, and thereby meets with injury, he can not recover, notwithstanding the negligence of another servant united in producing the injury. *Abend v. T. H. & I. R. R. Co.*, 111 Ill. 202; *C. & A. R. R. Co. v. Becher*, 76 Ill. 25; *C. & N. W. Ry. Co. v. Bliss*, 6 Ill. App. 411; *Chicago & Tomale R. R. Co. v. Simmons*, 11 Ill. App. 151. Reversed.

John Delbridge v. John D. Young.

VERDICT—*Conclusive, upon Conflicting Evidence.*—Where the evidence is conflicting, it is the business of the jury to say where the truth is.

Memorandum.—*Assumpsit.* Appeal from the Circuit Court of La Salle County; heard in that court on appeal from a justice of the peace; the Hon. DORRANCE DIBELL, Judge, presiding. Trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the December term, 1893, and affirmed. Opinion filed May 22, 1894.

MOLONEY, BURKE & MADDEN and SAMUEL RICHOLSON, attorneys for appellant.

THOMAS J. YOUNG and JAMES J. CONWAY, attorneys for appellee.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This is a suit brought by appellee upon a judgment recovered against appellant before a justice of the peace in

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1879. The defense interposed was that the action was barred by the statute of limitation, to which it was replied that there was a new promise on the part of appellant to pay the debt which took the case out of the statute. A trial resulted in a verdict and judgment in favor of appellee for \$200.

The only frictional question in the case is, as to whether the alleged new promise was sufficiently shown by the testimony. Upon this question three witnesses testified—appellee, a constable, named Charles Monroe, and appellant.

Appellee testified to several conversations had within five years before the commencement of this suit in which appellant promised to pay the debt. Monroe, who had the claim in his hands at one time within the five years for the purpose of collecting or obtaining a note with security, testified that appellant said it was an honest debt and that he should pay it as soon as he was able.

Appellant denied having had such conversation with either of them. In such a conflict it was the business of the jury to say where the truth was. We think they rightfully said it was with appellee and Monroe.

Although appellant did not use the word "judgment" in speaking of the debt which he said was an honest one, and should be paid by him, we think it was clearly understood by him and appellee that the promise meant and included the judgment debt.

We see no serious error in the instructions. The judgment does justice between the parties and should be affirmed. Judgment affirmed.

James Dinsmoor v. James H. Woodburn.

1. APPELLATE COURT PRACTICE—*Exceptions, How Taken and Preserved.*—Exceptions can only be taken and preserved by a bill of exceptions. Where a case is tried by the court without a jury, it is not necessary that a motion for a new trial should be made, overruled, and

exceptions taken, but it is necessary that there should be an exception to the finding and judgment.

Memorandum.—Appeal from the Circuit Court of Whiteside County; the Hon. JOHN D. CRABTREE, Judge, presiding. Heard in this court at the December term, 1893, and affirmed. Opinion filed May 22, 1894.

JARVIS DINSMOOR, attorney for appellant.

JOHN G. MANAHAN, attorney for appellee.

MR. JUSTICE CARTWRIGHT DELIVERED THE OPINION OF THE COURT.

This is an action of debt brought by appellee against appellant and Phebe A. Woodburn. Appellant was alone served with process and he appeared and filed a plea of *non est factum* together with a notice of certain alleged garnishment proceedings against him by judgment creditors of appellee in reduction of his liability to appellee, and a tender of \$39.39 balance due and costs of suit. Issue having been taken on the plea, a jury was waived and the cause was submitted to the court for trial. The court found the issues for appellee and assessed his damages at \$200, whereupon judgment was rendered against appellant for the debt and damages, to be discharged on payment of the damages and costs. From that judgment this appeal was taken.

The errors assigned are as follows:

"1st. The court erred in overruling defendant's motion for a new trial.

2d. The court erred in assessing damages at \$200 against the defendant (appellant).

3d. The court erred in disallowing the garnishment proceedings and the tender of \$39.39 introduced in evidence by appellant.

4th. The court erred in rendering judgment against appellant."

Evidence of the garnishment proceedings and tender was introduced and received by the court, and no error is assigned upon the admission or rejection of evidence, but

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the objection made under the third assignment is that the finding of the issues and judgment of the court were against the evidence so introduced.

The errors assigned question the finding and judgment, and none of them can be considered for the reason that the record contains no exception to the finding or decision or to the judgment rendered. The clerk has recited in the transcript of his record that a motion for a new trial was made and overruled and that exception was taken, and that defendant excepted to the judgment, but such statements can not be taken as a part of the record.

Exceptions can only be taken and preserved by means of a bill of exceptions. As this case was tried by the court without a jury, it was not necessary that a motion for a new trial should be made and overruled and exception taken, but it was necessary that there should be an exception to the finding and judgment. *Mahoney v. Davis*, 44 Ill. 238; *David M. Force Man'fg Co. v. Horton*, 74 Ill. 310.

The bill of exceptions in this case contains no allusion to any finding or decision of the court or to any judgment, nor any exception thereto, and we are therefore precluded from reviewing the judgment upon the alleged errors assigned. *Parsons v. Evans*, 17 Ill. 238; *Daniels v. Shields*, 38 Ill. 197; *David M. Force Man'fg Co. v. Horton*, *supra*; *Martin v. Foulke*, 114 Ill. 206; *James v. Dexter*, 113 Ill. 654; *Graham v. People*, 115 Ill. 566; *National Bank et al. v. Le Moyne et al.*, 127 Ill. 253. The judgment will be affirmed.

Jacob Frank v. James Heaton.

1. **SETTLEMENTS—Favored in Law.**—The law favors compromises and holds that the settlement of a doubtful claim, when there is neither actual nor constructive fraud, and the parties act in good faith with full knowledge of the facts, is a sufficient consideration to support a promise.

2. **SAME—Evidence of the Matter Compromised, Competent.**—Where a settlement is relied upon as a foundation for an action, evidence of the transaction compromised is proper to show the foundation of and circumstances surrounding the agreement to settle.

3. **RES GESTÆ—What is Competent as.**—Where fire escaped from an

engine and burned stacks of grain near by, evidence of what the owner of the stacks said to the man in charge of the engine is competent as a part of the *res gestæ* of the transaction.

Memorandum.—Assumpsit. In the Circuit Court of Whiteside County; the Hon. JAMES SHAW, Judge, presiding. Declaration; special and common counts; plea, general issue; trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 13, 1894.

J. E. McPHERRAN, attorney for appellant.

APPELLEE'S BRIEF, F. E. ANDREWS, ATTORNEY.

The compromise of a doubtful right, though it afterward turns out that the right is on the other side, when there is neither actual nor constructive fraud, and the parties act in good faith with a full knowledge of the facts, is a sufficient consideration to support a promise. *Honeyman et al. v. Jarvis*, 79 Ill. 322; *McKinley v. Watkins*, 13 Ill. 140; *Husband v. Epling*, 81 Ill. 172; *Sigsworth v. Coulter*, 18 Ill. 204; *Miller et al. v. Hawker*, 66 Ill. 186.

And this is true even where the parties are mistaken as to the law. *Stover v. Mitchell*, 45 Ill. 213; *Broadwell v. Broadwell*, 1 Gilm. 604; *Shafer v. Davis*, 13 Ill. 395; *Campbell v. Carter*, 14 Ill. 291; *Sibert v. McAvoy*, 15 Ill. 109; 1 Story's Equity Jurisprudence, Sec. 111, *et seq.*

The real consideration which a party receives under a compromise being, not the sacrifice of the right, but the settlement of the dispute and the abandonment of the claim, the fact that the one may have had no claim is immaterial, if he was honestly mistaken. *Honeyman et al. v. Jarvis*, 79 Ill. 322.

An adjustment of any unliquidated demand, whether in dispute or not, stands on similar principles. *Sutherland on Damages*, Vol. 1, 430; *Donahue v. Woodbury*, 6 Cush. 148; *Bateman v. Danelis*, 5 Blackf. 71; *Harris v. Storey*, 2 E. D. Smith 363; *Longridge v. Dorville*, 5 B. & A. 117.

MR. PRESIDING JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This was a suit by appellee against appellant to recover

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the agreed price of 1,200 bushels of oats belonging to the former, and destroyed in stack by fire escaping from the engine of appellant's thrasher while engaged in doing a job of threshing for appellee on the latter's farm.

The declaration, as originally filed, was in assumpsit, and contained only the common counts; but after the evidence ceased a special count was added, claiming recovery on a special agreement between the appellant and appellee, whereby it was charged appellant settled the claim of appellee for damages in negligently setting fire to his oat stacks, on a basis of 1,200 bushels of oats at twenty-five cents per bushel, or \$300; \$129 had been paid in cash, and a threshing bill of \$29, and recovery was had for the balance. The appellant's counsel insists, as a main ground for reversal, that there was not sufficient evidence to show any substantial claim on the part of appellee against appellant on which to even base a promise to pay.

We think the evidence is amply sufficient to establish, not only such a claim, but even to have established it without any settlement or promise.

It appears appellant set the engine in such a way as that the smoke and sparks from the engine were driven by a strong wind directly toward the stacks, instead of setting it on the west side of the stacks so that the sparks would have been driven in the opposite direction. Appellant acknowledged this at the supper table at appellee's, as shown by the evidence of Wm. Chiles, that "if he had set the engine the way Heaton (appellee) wanted to, it would have been all right." In this view of the evidence appellant made a positive agreement, as shown by the great preponderance of the evidence, to pay for the oats the amount stated, which the evidence tends to show was less than the real loss; but appellee was disposed, under the circumstances, to be lenient and reasonable in the matter, considering the misfortune and the loss to appellant by the accident.

The law favors compromises, and holds that the settlement of a doubtful claim, though it afterward turns out that the right is on the other side, when there is neither

actual nor constructive fraud, and the parties act in good faith, with the full knowledge of the facts, is a sufficient consideration to support a promise. *Honeyman et al. v. Jarvis*, 79 Ill. 322; *Hubbard v. Eppling*, 81 Ill. 172; and many other cases might be cited. The admission of the evidence of the circumstances of the burning was proper to show the foundation of and circumstances surrounding the agreement to settle, and whether competent to support the many counts, it was certainly made competent after the addition of the count on the promise. *C. & Pac. R. R. Co. v. Stein et al.*, 75 Ill. 41; *R. S.*, Chap. 7, Sec. 1; *McCollom v. Ind. & St. L. R. R. Co.*, 94 Ill. 534.

The evidence of what appellee said to Doolan, who was in charge of the engine, tended to show Doolan in charge, and was a part of the *res gestæ* of the transaction.

The fourth of appellee's instructions is not liable to the criticism made, that the instruction does not require the jury to base its finding on the evidence. The instruction starts out with that hypothesis, and the clause is understood in all the other clauses of the sentence and instruction. It is not necessary to repeat the requirement in every clause of the instruction, that the jury must find from the evidence. *Wetzell v. Grizzell*, 82 Ill. 325. This applies to the thirty-ninth and all other instructions based on such requirement. There was no error in appellee's second instruction in telling the jury that it made no difference even if appellant was not liable in the first instance. *Honeyman v. Jarvis*, 79 Ill. *supra*.

There was no error in modifying appellant's instructions. They were erroneous and should have been refused, and the court did not err in modifying each of them. Seeing no error in the record, the judgment of the court below is affirmed.

John Brown, William T. Jebb, and Albert F. Conrad,
Sheriff, etc., v. William A. Starin, Assignee, etc.

1. *ASSIGNMENT FOR THE BENEFIT OF CREDITORS—Does Not Pass Property Levied Upon.*—Where a sheriff obtains possession of property under an execution issued from the Circuit Court, and the defendant in execution afterward makes an assignment, the jurisdiction over the property does not pass to the County Court and to the assignee.

2. *SAME—Power of the County Court to Restrain the Sheriff from Selling Property.*—Where a debtor makes an assignment of his property for the benefit of his creditors, a portion of which is in the possession of the sheriff on executions previously issued, the County Court has no jurisdiction to enter an order restraining the sheriff from selling the property.

3. *SAME—Of Property in the Possession of the Sheriff.*—An assignment by an insolvent debtor of property in the hands of the sheriff, under executions against him, only carries a lien to the surplus after discharging the lien of the execution.

4. *SAME—Does Not Affect Judgment Liens Upon Real Estate.*—A person who has recovered a judgment against another in the Circuit Court, and which is a lien upon the real estate of the defendant, is not deprived of his right to enforce his remedy in that forum by reason of a subsequent assignment for the benefit of creditors by the defendant.

5. *SAME—Judgment Creditors Do Not Waive Rights by Filing Claims for Allowance.*—A judgment creditor, whose judgment is in the Circuit Court, does not waive his right to enforce his judgment by execution from the Circuit Court upon the realty of the defendant, by filing his claim with the assignee of the judgment debtor for allowance in the County Court.

Memorandum.—Appeal from an interlocutory order under the voluntary assignment act, entered by the County Court of Lake County; the Hon. FRANCIS E. CLARK, Judge, presiding. Heard in this court at the May term, 1894. Reversed and remanded. Opinion filed December 18, 1894.

COOKE & UPTON, attorneys for appellants.

DUPEE, JUDAH & WILLARD, attorneys for appellee.

MR. PRESIDING JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

The appellee is the assignee of the United States Starch Works by and of assignment October 26, 1893.

Thirteen judgments were rendered in the Circuit Court against the said starch works August 16, 1893. One in favor of John Brown and the remaining twelve in favor of William T. Jebb.

The Drovers National Bank became the owner of the Brown judgment, and Anna B. Jebb, The United States Sugar Refinery and F. B. Kennard were assignees of the Jebb judgment. The aggregate amount of the judgments was \$53,999.92 and the other claims against the starch works aggregated about \$80,000.

The several assignees of the said judgments have caused executions to issue out of the Circuit Court in said judgment, and Albert F. Conrad, the sheriff of said county, had advertised the sale of the said starch works, being realty, on the 16th April, 1894.

On the 13th April, the appellee, Starin, being the assignee of said starch works, filed his petition in writing asking for a restraining order against said sale, which on the same day was allowed, and the proposed sale restrained until the further order of the County Court.

The decision and hearing were *ex parte*, but the appellants have appealed therefrom, being parties thereto.

The petition shows the above facts and shows that the assignee was in possession of the starch works, consisting of real estate and the building thereon and machinery, fixtures and appliances in said building, and the same was inventoried by appellee at \$66,000, and avers that at a forced sale it would bring less than its real value; that the sale would exhaust the assets, and if applied on the executions, would leave nothing to apply on the other claims. The petition further showed that one Marshall O. Terry, a creditor of the starch works, had filed his bill in chancery in the Circuit Court of Lake County, seeking on equitable grounds to set aside the Jebb judgment as fraudulent, procured through conspiracy between him and a majority of the directors of the starch works, and praying for an injunction against the collection of the same; that the bill had been demurred to and not yet passed on by the court; that on some day in

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March the starch works had filed a motion in the Circuit Court to open and vacate six of the said twelve judgments rendered in favor of Jebb, supported by affidavits, and that the Circuit Court had not been able to hear the motion because it had not been in session since the motion was made.

The petition further shows that the assignees of the various judgments had filed alleged proofs of their claims in the County Court upon said judgments with appellee, assignee, on the 13th day of February, 1894, and that said appellee and William G. Comstock, on 14th March, 1894, had filed exceptions thereto; that the exceptions had not been passed on or allowed, and were still pending and undisposed of.

The petitioner claims that the said assignees of the judgments, by filing their claims as alleged, subjected themselves to the jurisdiction of the County Court, and that said County Court could not pass on such claims and can not distribute the assigned property according to such finding on said claims if said property is disposed of by said proposed sale, and that it was indispensable to the protection of the said property and for just distribution of the assets of said starch works; that the same shall remain in possession and control of said court till final hearing shall have been had upon the claims presented against said estate and the rights of the respective claimants there determined.

The above petition in substance was the ground upon which the County Court assumed jurisdiction and entered the order restraining the sheriff's proposed sale.

The appellant objects that the County Court had no jurisdiction, and that even if it had, that the petition failed to show any grounds of relief, inasmuch as it showed no equitable defense to the judgments complained of.

We are of the opinion that the County Court had no jurisdiction to enter the restraining order. It is established in *Hanchett v. Waterbury*, 115 Ill. 229, that the court first obtaining jurisdiction will hold it; so also, in the case of personal property, where a sheriff obtains possession of personal property under an execution issued from the Circuit Court and an assignment is afterward made, the jurisdic-

tion over the property does not pass to the assignee and to the County Court. The assignment only carries a lien to the surplus after discharging the liens, and to test the validity of the liens, resort by the assignee must be had to the forum from whence the execution issued. *Plume & Atwood Mfg. Co. et al. v. Colwell*, 136 Ill. 163.

In case of mechanics' lien it has an established claim. Under the statute he does not lose his right to enforce it in the Circuit Court because the owner of the equity of redemption makes an assignment, nor because he may have filed his claim with the assignee and received a general dividend on his claim. *Paddock et al. v. Stout et al.*, 121 Ill. 571.

The principle in the case cited appears to rest on the basis that the statute gives the lienor the right to go into the Circuit Court and enforce his lien as soon as the debt matures. And his right to enforce his remedy in that forum is not taken away by reason of a subsequent assignment for the benefit of creditors, not even if he files his claim with the assignee for payment.

We are of opinion that this is a case analogous in the principles of law involved. The appellants' lien was established on the real estate in question by the recovery of their respective judgments, and they had the undoubted right to an execution from the Circuit Court on such judgments to enforce their liens; and the property being realty, under our statute the sheriff was not required to have possession of it in order to authorize him to make sale of it under his executions.

All that he was required to do was to make a "pen and ink" levy, advertise and make sale; then the holder of the equity of redemption would have the right of redemption given by the statute.

It is true a plaintiff in execution may waive his right to proceed in the forum where he has established his right to seek and enforce his remedy, by, in case of personal property, yielding up his right to have the sheriff proceed under his prior possession and make sale (*Plume & Atwood Co. v. Colwell*, *supra*), and we have no doubt he might formally yield

Clay v. C., B. & Q. R. R. Co.

his right in case of real estate in some unequivocal way, showing a clear intention so to do, but we do not think that the mere filing his claim with the assignee for allowance would be such an act as would have such an import in reason or justice. Even if one has a specific lien on real estate he has the undoubted right to take his proportionate share out of other assets on which he has no specific lien, and he is compelled by the statute to file his claim within a certain time or lose such right.

We are therefore of the opinion that the County Court had no jurisdiction to restrain the sheriff from making the sale under his executions. Such order, if any equitable grounds existed on which to base it, should have been applied for in the Circuit Court or to the judge in vacation, either on motion for stay or by bill for injunction. Holding want of jurisdiction in the County Court to enter the injunction, it would not be necessary or proper to pass on the question of the sufficiency of the petition in case the court had jurisdiction.

The order of the County Court restraining the sheriff from making sale under levy on the United States Starch Works plant, complained of in appellee's petition, is reversed and the cause remanded.

**James L. Clay v. The Chicago, Burlington and Quincy
R. R. Co.**

1. **FELLOW-SERVANTS**—*One Occupying a Superior Position.*—Where one servant is injured by the negligence of another servant of the common master, the fact that the negligent servant occupies the superior position in the line of employment, such as foreman, engineer or conductor, having the supervision and direction of the work or service, does not affect the question of the master's liability.

2. **MASTER AND SERVANT**—*Liability of Master for Negligence of his Servant.*—Where the master delegates authority to a servant, the master may be liable for the consequences of a negligent or wrongful exercise of the authority conferred, but to render the master liable the injury must arise out of, and result from the exercise of, the delegated power.

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61	632
56	235
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Memorandum.—Action for personal injuries. In the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding. Declaration in case; plea, not guilty; verdict for the defendant by direction of the court; appeal by plaintiff. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 13, 1894.

G. E. GLASS, attorney for appellant.

SAMUEL RICHOLSON, attorney for appellee; O. F. PRICE, of counsel.

MR. JUSTICE CARTWRIGHT DELIVERED THE OPINION OF THE COURT.

Appellant brought this suit against appellee to recover damage for the loss of his leg, which was cut off above the ankle by an engine being started while he was engaged as an employe of appellee under the engine, cleaning the ashes out of the ash pan into the ash pit. At the conclusion of the evidence for plaintiff the court directed a verdict for defendant which was returned by the jury, and judgment was entered accordingly. The grounds alleged, and upon which it was sought to charge the defendant with plaintiff's injury, were that the ash pan was not deep enough for safety, and for that reason defendant had failed in its duty to provide him, as its servant, with a safe ash pit to work in, and that defendant was chargeable with the negligence of its servant who started the engine. The facts proved by the plaintiff were as follows: He was a young man about twenty-one years old. He worked for defendant at the round house and yard in Streator at shoveling coal, drying sand, wiping engines and doing whatever he was directed, from August 12, 1890, to September 16, 1890, when the accident occurred. McDaniels was foreman at the round house and hired plaintiff, and Mooney was a hostler with whom plaintiff worked as helper. In caring for an engine and preparing it to go out on the road, it was the duty of the hostler and his helper to take it to an ash pit and clean the ash pan by raking the ashes into the pit. The ash pit in which the injury occurred was twenty-six feet long and

eleven inches deep and the engine came within a few inches of the top of the rail. Plaintiff had worked in that pit once or twice about four or five days before the accident. On the evening that he was hurt he and Mooney took an engine, filled it up with water and coal, cleaned out the ashes and put it in the round house, and took another engine to give it the same treatment. After putting in coal it was run over the ash pit. The relations of plaintiff and hostler were similar to those of a fireman and engineer of a locomotive. The hostler ran and managed the engine, and it was the duty of plaintiff, as helper, to go under the engine and scrape the ashes out of the ash pan. He was under for that purpose, and as he was drawing the ashes out and lying partly down on one knee and elbow the hostler started the engine backward, and to escape being drawn into burning coals and cinders he tried to get out at the side and his leg was run over and cut off. The ash pit was of the same depth that it had been for many years and in the same condition, except as it would become filled with ashes and emptied from time to time.

There was no evidence tending to show, nor is it claimed that the ash pit was not entirely safe for the servants of defendant in the usual and proper method of its use. The only danger that could arise would come from the negligent and improper starting of an engine while some person was under it, in which event a greater depth would make it easier to avoid such danger. The immediate cause of plaintiff's injury was the negligent starting of the engine by the hostler; but so far as the depth of the ash pit could be treated as contributing to plaintiff's injury, either as an efficient cause in and of itself, or as concurring with the negligence of the hostler to constitute in combination such cause, the evidence showed that there could be no recovery against defendant, because the depth and nature of the ash-pit, the amount of space it contained when an engine stood over it, and all the dangers arising from its condition were open and obvious to plaintiff, and known to him both by observation and experience in going into and working in it.

Simmons v. Chicago and Tomah R. R. Co., 110 Ill. 340; Abend v. T. H. & I. R. R. Co., 111 Ill. 202; Stafford v. C., B. & Q. R. R. Co., 114 Ill. 244.

But it is argued that defendant was liable for the negligence of the hostler on the ground that he stood in the relation of a foreman to the plaintiff and in what he did was a representative of defendant. Where one servant is injured by the negligence of another servant of the common master, the fact that the negligent servant occupies the superior position in the line of employment, such as foreman, engineer or conductor, having the supervision and direction of the work or service, does not affect the question of the master's liability. Cooley on Torts, 562; C. & A. R. R. Co. v. May, 108 Ill. 288; Abend v. T. H. & I. R. R. Co., *supra*. Where the master delegates authority to a servant the master may be liable for the consequences of negligent or wrongful exercise of the authority conferred, but to render the master liable, the injury must arise out of, and result from, the exercise of the delegated power as held in C. & A. R. R. Co. v. May, *supra*, in which the master was held liable because May's death was the direct result of an improper and inconsiderate order of the foreman. It was upon the same principle that the master was deemed responsible in Chicago Anderson Pressed Brick Co. v. Sobkowiak, 45 Ill. App. 317, and 148 Ill. 573. There was no such element in this case. The duty performed by plaintiff was the same and was performed in the same way as usual. There was no direction by the hostler as to the method of doing the work or any order which increased the usual hazard of the undertaking. There could be no question that plaintiff was a fellow-servant of the hostler.

There was no evidence tending to prove a cause of action against defendant, and the direction to find in its favor was right. The judgment will be affirmed.

James Flynn v. Carrie J. Wilkinson et al.

1. **ESTOPPEL**—*Not by Statements in a Borrowed Abstract of Title.*—The mere act by the owner of an abstract of title of allowing a party to use it as an accommodation, can not have the effect of binding such owner to answer for any representations of title contained in the abstract.

2. **SALES EN MASSE**—*Motion to Set Aside.*—Where a judicial sale of land is irregular, as being made *en masse*, persons affected thereby may have the same set aside by motion before the period for redemption expires.

3. **IMPROVEMENTS**—*Pass by Foreclosure Sale.*—Improvements put upon lands pass by a foreclosure sale.

Memorandum.—Foreclosure proceedings. Appeal from the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 13, 1894.

E. C. SWIFT, attorney for appellant.

A. E. WHEELER, ARMSTRONG & HANNA and CLARENCE GRIGGS, attorneys for appellees.

MR. JUSTICE CARTWRIGHT DELIVERED THE OPINION OF THE COURT.

Appellant filed his bill to foreclose a mortgage made to him February 19, 1891, by Carrie J. Wilkinson and husband, upon lot 13, in block 3, of Strawn and Hammond's addition, to Ottawa, to secure the sum of \$300 and interest. It was alleged in the bill that at the time the mortgage was made there was a judgment in the County Court of La Salle county in favor of Daniel Hitt against Emily Weiss, a former owner of the lot; that a tract of land and the lot were sold together April 21, 1891, by virtue of an execution issued on the judgment, to Albert E. Butters, and a deed was subsequently made to said purchaser; that Butters afterward conveyed the lot by quit-claim deed to Edgar Eldredge, who afterward conveyed it by quit-claim deed to Alden E.

Wheeler, and Wheeler conveyed it by like deed, December 8, 1892, to Jacob Barr, and that Barr, on the same day of the conveyance to him, executed a mortgage to Lorenzo Leland on the lot, to secure the sum of \$600, and interest. All said parties were made defendants, and are the appellees in this court. It was charged in the bill that the title of Barr and the mortgage of Leland were subject to appellant's mortgage, on the ground that appellant's mortgage was taken on the faith of an abstract furnished by Barr, and representations made by him as to the title, and that all the defendants had notice of appellant's lien, and the circumstances under which it was acquired. The defendants answered, and Leland filed a cross-bill to foreclose his mortgage. On a hearing the court dismissed appellant's bill at his cost, for want of equity, and gave relief to Leland upon his cross-bill.

The evidence failed to sustain the charges of appellant's bill against Barr. At the same time that lot 13 was conveyed by Emily Weiss and husband to Carrie J. Wilkinson, and said Carrie J. Wilkinson and husband executed the mortgage to appellant, said Emily Weiss and husband conveyed lots 14 and 15 in the same block to Barr, who had an abstract of title to said lots 14 and 15, made by the recorder of La Salle county, and loaned the abstract to the attorney who drew the papers. It did not purport to be an abstract of the title to lot 13, and the caption and certificate related to lots 14 and 15 only; but it showed a conveyance of all three of the lots to Emily Weiss, and it was doubtless supposed by the attorney that if there were no judgments which were liens on the lots named in the caption as stated in the certificate, there would be no such liens on lot 13. But Barr made no representations as to the title or liens, and so far as appears, believed the recorder's certificate to be true. He was not guilty of any fraud or deception nor in any manner responsible for the failure to examine the title to lot 13. His mere act of allowing the use of his abstract as an accommodation could not have that effect.

Appellant had a right to redeem from the sale under the

Flynn v. Wilkinson.

execution against Emily Weiss within twelve months from such sale, and by failing to make such redemption, his mortgage lien was extinguished. It is argued, however, that the sale was invalid because the lot was sold with a tract of twenty acres located elsewhere. The point was not made by the bill, but the sale *en masse* was offered as an excuse for not redeeming because appellant could not tell how much was necessary to redeem the lot. If, however, there was an irregularity in the sale in that respect, appellant had an ample remedy by motion to set aside the sale during the time allowed for redemption. Having allowed that period to expire, he could not be permitted to set it aside for such reason. *Hay v. Baugh*, 77 Ill. 500. It is also suggested that lot 13 was a homestead and exempt from sale. This question also was not raised by the bill, but the evidence negatives the claim that it was a homestead.

After Barr acquired title, derived from the execution sale, he obtained a quit-claim deed of lot 13, on January 28, 1893, from Carrie J. Wilkinson and husband in consideration of \$320, consisting of a pre-existing debt to him, and it is claimed that he took the deed charged with all the liabilities of the grantors, because there was a dower right in Gottlieb Weiss, husband of Emily Weiss, not barred by the execution sale, which inured to the benefit of Barr through the quit-claim deed. So far as appellant's mortgage lien was concerned Barr was able to show that it had been extinguished by a sale under the execution and a failure to redeem. The lien was not kept alive by the existence of an outstanding dower right in Gottlieb Weiss, and taking the quit-claim deed neither revived the lien nor made Barr, who claimed and held under a different and paramount title, personally liable for the debt.

Appellant also claims that he should have had an allowance to the extent of improvements put upon the premises by Wilkinson, for which purpose the money loaned by appellant was used. The premises were subject to the lien of the judgment which was of record and afforded notice to all parties interested.

The improvements passed upon a sale of the premises to the purchaser, and there were no circumstances which would have justified such an allowance. The decree will be affirmed.

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158s 321

Chicago, Burlington & Quincy R. R. Co. v. Samuel Yorty.

1. RAILROAD COMPANIES—*Frightening Horses*.—Where a railroad company employs a person to work with a team upon its right of way, and the character of the work required, and the proximity to passing trains, calls for more than usual care and watchfulness in the management of the team, this requires the employes of the company running trains to discharge their duties with additional care and so as not to expose such person to unnecessary damage.

Memorandum.—Action for frightening horses. In the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding. Declaration in case; plea, not guilty; trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 18, 1894.

SAMUEL RICHOLSON, attorney for appellant; O. F. PRICE, of counsel.

O'CONOR, DUNCAN & HASKINS, attorneys for appellee.

MR. JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This suit was brought by appellee to recover for injuries sustained by reason of his team becoming frightened at a passing freight train on appellant's railroad, and running over him, thereby breaking his leg.

The wrongful acts charged in the declaration, were the sounding of the locomotive whistle in such a loud, needless, wanton and malicious manner, and the causing of steam to be emitted from the steam chest and cylinder of the locomotive in such a needless, wanton and malicious manner as to frighten the plaintiff's team and render it unmanageable.

The case was tried by a jury and a verdict rendered in

favor of appellee for \$3,000; there was a remittitur for \$1,000 entered, whereupon the court overruled a motion for a new trial, and rendered a judgment for \$2,000.

In seeking a reversal of the judgment appellant contends that there was no wrongful act or neglect of the defendant or its servants in charge of the train shown, and that appellant failed to exercise proper care and caution for his own safety.

The evidence shows that appellee was employed with his team and a scraper upon appellant's right of way, by one Hiltenbrand, who had a contract for filling up under the railroad. The right of way at the place where the work was in progress, is fifty feet on each side of the track. It was the first day of appellee's employment. Several other men with their teams were upon the right of way engaged in the same work. As the freight train in question approached from the south, appellee went to the heads of his horses, to quiet and hold them until the train should pass. He and one other man with a team, were on the west side of the track. Two men, with teams were on the east side. About 500 feet south of this point is a whistling post for north bound trains, and about 1,000 feet north is what is known as the Bloomington or gravel road. When passing the whistling post the engine sounded the usual alarm. After the sounding of the whistle at that point, as the train approached, a man could be seen looking out of the window on the west side of the cab. When the engine got almost opposite to the men holding their teams the man withdrew his head from the cab window and immediately two or three sharp whistles such as are usually given to scare stock off the track, were sounded, steam was emitted violently from the escape pipe and appellant's horses, which up to that time had been quiet, became frightened and unmanageable, knocking appellee down, and rushed over him, breaking his leg near the hip joint. It was the engineer who caused the whistle to be sounded, and as he was on the right side of the cab, leaning out of the cab window, he was not in a position to see appellee and his horses. This fact, it is claimed,

refutes the idea that the whistle was blown in a reckless, wanton or malicious manner to frighten the horses. It is claimed, too, that inasmuch as the train was approaching a dangerous highway crossing, through a deep cut, the engineer was but performing a duty imposed by the law to give warning to travelers upon the highway.

The conditions were such as to impose upon appellee and the servants of appellant some additional care. The character of the work required of appellee, and the proximity of his team to passing trains, called for more than usual care and watchfulness in the management of his team. The danger and exposure incident to the particular work to which appellant had invited appellee, were such as to require the employes running trains to so discharge their duties as not to expose appellee and others working with him to unnecessary danger. If the train was approaching a highway crossing, and it was apparent that the law as to giving alarm could be complied with in such manner that appellee's team and others would not be frightened, then it was the duty of the engineer to perform that duty in such manner.

The evidence shows that appellee exercised all the care and watchfulness legally required under the circumstances. Two trains had passed on the same day of the accident while the horses were upon the work without frightening them. Appellee adopted the same plan of standing at their heads and quieting them that he had on the two occasions before. We entertain no doubt that the accident would not have occurred but for the sharp, shrill whistles of alarm given just as the engine reached the point where the horses stood. If the engineer was not in a position to see appellee, he was in a position to see the two men with their teams on the east side of the track. The danger to which they would be exposed by the character of the alarms given were apparent. The whistle had already been sounded at the whistling post 500 feet away, and the engine bell was being rung. To fulfill the statutory duty required at the approach of highway crossings did not call for the alarms which were given, right in the midst of several teams in plain view of

Steurer v. Ried.

the engineer. The conduct of the engineer under the circumstances was reckless, wanton and willful.

We are of the opinion that the verdict of the jury is fully sustained by the evidence. We see no just cause of complaint against the ruling of the court on the admission of evidence or the giving of instruction. Judgment affirmed.

Mary Steurer, by her Next Friend, v. Charlie Ried.

1. VERDICTS—*When Not to be Set Aside.*—A verdict will not be set aside when there is a conflict of evidence, and the facts and circumstances, by a fair and reasonable intendment, will authorize it.

2. EVIDENCE—*Declaration of a Person in Fits of Hystero-Epilepsy Not Admissible.*—The exclamations of a female plaintiff while in a fit of hystero-epilepsy, and while kicking and striking, calling the name of the defendant, telling him to get away from her and other expressions of a similar character, are not admissible as evidence in a suit of trespass for debauching her.

3. INSTRUCTIONS—*When Both Parties Testify.*—The law regarding the giving of prominence by instructions to the interest of parties litigant in the event of the suit applies equally to both parties where each are sworn and testify, and the decision of the jury hinges on the question of their respective credibility.

Memorandum.—Action for debauching and ill-treating plaintiff. In the Circuit Court of Boone County; the Hon. CHARLES KELLUM, Judge presiding. Declaration in trespass; plea of general issue; trial by jury; verdict and judgment for defendant; appeal by plaintiff. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 18, 1894.

WM. BIESTER and GARVER & FISHER, attorneys for appellant.

CHARLES E. FULLER and WILLIAM C. DEWOLF, attorneys for appellee.

MR. JUSTICE CARTWRIGHT DELIVERED THE OPINION OF THE COURT.

Appellant, who was then a minor, brought this suit by her next friend against appellee to recover damages alleged

to have resulted from a series of indecent assaults made upon her by appellee while a servant in his family, making her nervous, timid and apprehensive, and causing her to have fits of hystero-epilepsy. There was a trial resulting in a verdict and judgment for appellee.

Plaintiff is a German girl who came to this country when eleven years old, and began working for defendant, who is a farmer in Boone county in this State, in November, 1889, when she was fourteen years old. She worked for him in the house, and sometimes out of doors, from that time until March 2, 1892, with the exception of four weeks in the summer of 1891. In November, 1891, she became nervous and easily startled and alarmed, and from that time she had occasional nervous attacks and fits of hystero-epilepsy, during which she was greatly terrified and writhed upon the bed, striking, kicking and tearing the quilts. She seemed afraid of the defendant, and other persons who came near her. Some of the time she could not sleep alone, and she became very weak and debilitated. Her health remained poor after leaving defendant's house. It was claimed on the trial that her sad condition resulted from assaults upon her by defendant, commencing in May, 1891, and repeated at intervals afterward, which were successfully resisted by her, but which were endured without public complaint because of arguments and threats of defendant to induce silence on her part. There was evidence that assaults such as she related would be an adequate cause for the terrible nervous disorders from which she suffered. Whether such assaults were proved depended upon the testimony of the parties to the suit. She affirmed that he committed them and detailed occurrences, giving his acts and language, of the vilest description. He denied her charges with equal emphasis. There is nothing in the record which enables us to say which one the jury should have credited. It is remarkable that a simple, industrious country girl working on a farm should have become acquainted with such language as she repeated in court, unless through some experience similar to that related by her, and this, with other facts, lend proba-

bility to her story; but on the other hand, when she left defendant's house she permitted a younger sister to take her place when there was no necessity for her doing so, and such fact, with her apparent friendliness to defendant, tended to discredit her. The defendant was sixty-seven years old, and had lived in the same locality near where the case was tried for forty-eight years. The jury believed him, and their finding had the approval of the judge who presided at the trial. They were in a situation to judge of the truth of the respective statements, and we see no reason to differ with them in their conclusion.

Plaintiff offered to prove her declarations while in the fits of histero-epilepsy, and to show that while kicking and striking she repeated the name of defendant, and told him to get away from her, and made other expressions of that kind, but the evidence was not admitted, and this is claimed to have been an error.

The evidence was that she was not rational at such times, and that her outcries might or might not have some connection with the cause of her disorder. They were not proved to indicate such cause and the ruling was right.

Some of the instructions given for defendant are subject to just criticism. The second was as follows:

"While the law makes the plaintiff a competent witness in this case, yet the jury have a right to take into consideration her situation and interest in the result of your verdict, and all the circumstances which surround her, and give to her testimony only such weight as in your judgment it is fairly entitled to."

This instruction gave prominence to the interest of plaintiff in the result of the suit and ignored the same cause affecting the credibility of defendant, and the decision of the jury hinged on the question of their respective credibility. The rules in that regard applied equally to the parties, and in a statement of the law they should be presented to the jury as so applying. The instruction might have been refused with propriety. Other instructions are objectionable, but this is the only one that, in view of all the evidence, we

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think, might have proved detrimental to plaintiff, and we are not disposed to reverse the judgment on account of it. We should scarcely expect a different result upon another trial with the burden of proof resting upon plaintiff to prove the assaults by a preponderance of the evidence. Affidavits were made charging misconduct of persons not parties to the suit in attempts to influence the jury, but they were contradicted by counter affidavits and the charges were not sustained.

We do not feel justified in reversing the judgment on account of such errors as are found in the instructions, and it will therefore be affirmed.

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Minnesota Lumber Co. v. The Whitebreast Coal Co.

1. *SET-OFF—Contracts Void for Uncertainty or for Want of Mutuality.*—An agreement *malum prohibitum*, or which is void for uncertainty or for want of mutuality, can not be pleaded by way of set-off.

2. *Contracts—A Promise as a Consideration.*—The general rule is that a promise is not a good consideration for a promise unless there is mutuality of agreement.

3. *Options—What is, etc.*—The privilege of ordering any quantity of coal, not in excess of a certain number of tons, is an option to buy coal.

4. *SAME—Do Not Always Render a Transaction Illegal.*—Although there may be some illegal feature indirectly connected with a transaction involved in a suit, yet the plaintiff may recover if his cause of action is otherwise legitimate, and he can make out his case without calling to his aid the illegal agreement.

Memorandum.—Assumpsit. In the Circuit Court of De Kalb County; the Hon. HENRY B. WILLIS, Judge, presiding. The pleadings are contained in the statement of the case; trial by the court without a jury; finding and judgment for the plaintiff; appeal by defendant. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 13, 1894.

STATEMENT OF FACTS.

This is an action of assumpsit by appellee against appellant to recover for coal sold and delivered.

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The declaration contains only the common counts. The general issue and two special pleas of set-off were filed. The first special plea set up the following contract:

“POLO, ILL., Aug. 4, 1886.

Memorandum of contract between the Whitebreast Coal Company, by S. G. Russell, agent, and Minnesota Lumber Company: The said Minnesota Lumber Company agrees to buy its requirements of anthracite coal for season of 1886-1887 (upon condition named hereafter), of said Whitebreast Coal Company, which is to furnish the same as ordered (best quality of Scranton coal), at following prices f. o. b. cars at Milwaukee or Chicago, at option of said M. L. Co., to-wit: \$4.35 per ton for egg and grate and \$4.60 for stove and nut up to November 1st, after which time said prices shall be advanced five cents per ton for the remaining term of this contract. Other sizes at proportionate prices. Payments on shipments to be settled on 15th of each month following shipment in a sixty day acceptance of said M. L. Co. without interest.

In the event of lower prices than the above on standard anthracite coal being offered said M. L. Co., the said Whitebreast Coal Company agrees either to accept such lower prices on balance of coal not shipped or release said M. L. Co. from further liability on this contract.

It is further agreed that the prices last herein made shall apply to orders up to January 1, 1887. It is agreed that this contract shall be binding on both parties provided the said M. L. Co. shall confirm the same by telegraph any time during this or the following day.

(Signed) WHITEBREAST COAL CO.,

By S. G. RUSSELL, Sales Agent.

MINNESOTA LUMBER CO.,

By GEO. W. PERKINS, Sec'y.”

The plea then avers that the defendant's requirements of anthracite coal, between the dates of August 5, 1886, and January 1, 1887, were twenty-five thousand tons; that defendant made orders at different times for coal, but that the plaintiff failed and refused to fill them, to the damage

of defendant of \$25,000, for which it tendered set-off and prayed judgment.

The second special plea set up the above contract and the following additional one entered into August 21, 1886:

“Whereas, a dispute has arisen between the parties to the within instrument, it being claimed by the Whitebreast Coal Company that the said instrument does not constitute a valid engagement upon their part to furnish coal, which claim is denied by the said Minnesota Lumber Company.

Now, therefore, in order to arrive at an amicable settlement of the dispute pending, it is mutually agreed by the said Whitebreast Coal Company and the Minnesota Lumber Company that the said alleged contract shall be performed upon the following conditions and exceptions: Coal shall be billed and paid for at the rate of \$4.45 per ton for egg and grate, and \$4.70 for stove and nut and No. 4. As soon as convenient hereafter each of the parties hereto shall choose an arbitrator, they to choose a third, which three arbitrators, upon a hearing of the respective claims of each of the parties, shall decide whether the Minnesota Lumber Company is entitled to its coal at the prices named in the within alleged contract of August 4th. In case of an affirmative decision of this question the Whitebreast Coal Company shall rebate to said Minnesota Lumber Company the difference between said contract prices and the amended prices mentioned herein. In case of a negative decision, the said amended prices shall be in final settlement of the coal. It is agreed that the coal shall be settled for in sixty days paper as before mentioned, and it shall also be decided by said arbitrators whether the paper shall be with or without interest. It is agreed that this arbitration shall be made under the statute of the State of Illinois.

It is agreed that the Whitebreast Coal Company shall pay the Minnesota Lumber Company the difference between the prices fixed by arbitration and the cost price upon all coal ordered by Minnesota Lumber Company between August 4, 1886, and the date hereof. It is also agreed that the

Minnesota Lumber Co. v. Whitebreast Coal Co.

Minnesota Lumber Company shall have the privilege, under this contract, of ordering any quantity of coal not in excess of 12,000 tons, which agreement is in lieu of stipulation for requirements.

This amount of coal ordered between August 4th and date, not to exceed 200 tons. It is distinctly understood and agreed that neither party hereto waives any of the respective rights heretofore claimed.

POLO, Ill., August 21, 1886.

MINNESOTA LUMBER COMPANY,

By Geo. W. PERKINS, Sec.

WHITEBREAST COAL COMPANY,

By C. K. PITTMAN, Gen. Agt."

The plea then avers that the plaintiff delivered a small portion of the coal provided for and then refused and failed to deliver other coal as ordered in accordance with the contract, to the defendant's damage of \$25,000, for which it tendered set-off and prayed judgment.

The Circuit Court sustained a general demurrer to both these pleas. The defendant stood by the pleas, a jury was waived and the cause was tried by the court upon the declaration and general issue. The court found for the plaintiff and rendered judgment for \$9,254.36, from which the defendant appealed, and claims that the court erred in sustaining a demurrer to the special pleas of set-off, and also in rendering judgment for the value of the coal shipped and delivered to the defendant.

APPELLANT'S BRIEF, CARNES & DUNTON, ATTORNEYS; JOHN P. WILSON, OF COUNSEL.

When the meaning used in a contract is doubtful, or susceptible of two senses, that is to be adopted which will give effect to the intent, as a legal contract, rather than that which renders it inoperative. *Thrall v. Newell*, 19 Vt. 202; 47 Am. Dec. 682; *Chitty on Contracts*, 79, 80.

Where the terms of a contract are susceptible of two significations, we ought to understand it in the sense which is most agreeable to the nature of the contract; and where

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a clause is susceptible of two different constructions, it should be taken in that sense which will give it some operation, rather than that which gives it none. *Evans v. Saunders*, 8 Porter, 497; 33 Am. Dec. 297.

The words "with interest at ten per cent," in a contract, are construed by adding "per annum," to avoid construing the contract usurious. *Crittenden et al. v. French*, 21 Ill. 598.

As an executory contract may be altogether discharged by mutual agreement, so it may be changed. The undertaking of each party to do something different from that which he first agreed to do furnishes a consideration for the promise of the other. A subsequent agreement to vary the performance of a contract in a way that would make it unlawful is merely inoperative, and leaves the original contract in force. *Eng. and Am. Enc. of Law*, Vol. 3, page 890.

Where a city expressly contracts to pay for paving a street, a subsequent modification of the details of the contract, and in which provision is made for the assessment and collection of certain portions of the expense, which mode of collection was subsequently declared by the court to be illegal, will not be held to be an abandonment or waiver of the original agreement of the city to pay for the paving. *City of Memphis v. Brown*, 20 Wall. (U. S.) 289.

By the law merchant an oral promissory note is impossible; it must be in writing; consequently an oral agreement varying such a note is repugnant to the whole transaction, and it will be rejected as void. *Bishop on Contracts*, section 770.

After the executory contract has been made, it may be converted into a complete bargain and sale by the appropriation of specific goods to the contract. The sole element deficient in a perfect sale is thus supplied. The contract has been made in two successive stages instead of being completed at one time, but it is none the less one contract, namely, a bargain and sale of goods. 1 *Benj. on Sales*, 4th Am. Ed., Sec. 488.

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An executory sale is a contract for the transfer of property. The transfer of title is the execution of that contract. Tiedeman on Sales, Sec. 1.

Any contract made for the purpose of giving effect to an illegal agreement, or directly having its origin therein or based thereon, or growing immediately out of the same, is void. Greenhood on Public Policy, Rule 10.

An illegal contract vitiates all substituted contracts, and also all contracts contrived or intended to carry that contract into effect. *Boutelle v. Melendy*, 19 N. H. 196, 49 Am. Dec. 252.

If the contract be in part only connected with the illegal transaction, and growing immediately out of it, although it be in effect a new contract, it is thereby equally tainted. *Nash v. Monheimer*, 20 Ill. 217; *Penn v. Bornman*, 102 Ill. 531; *Webster v. Sturges*, 7 Brad. 560; *Shenk v. Phelps*, 6 Brad. 613.

Undoubtedly the parties, after having made an illegal contract, are at liberty to enter into another contract in relation to the same subject-matter, precisely the same as though no former contract existed. But the new contract must be in no sense a continuation or modification of the old. The old contract must be utterly abandoned, so that neither its terms, nor any claim of right springing out of it, shall enter into the new. *Webster v. Sturges*, 7 Brad. 564.

APPELLEE'S BRIEF, WM. BARGE AND WM. MCNETT,
ATTORNEYS.

Appellee contended that the appellant never intended any definite quantity should be fixed by the agreement, but that the amount should be determined by its own discretion. This uncertainty is a patent ambiguity, and can not be affected by extraneous evidence. A writing may be ambiguous because the writer intends it to be so. 2 Wharton, Ev., Sec. 957. And when so it can not be helped by parol evidence. 2 Wharton, Ev., Sec. 957.

Extrinsic evidence is not admissible to remove a patent

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ambiguity, and the instrument is inoperative and void. 1 Am. & Eng. Ency., 529.

A patent ambiguity is an ambiguity which arises upon the words of the will, deed or other instrument, as looked at in themselves, and before they are attempted to be applied to the object, or to the subject which they describe. 1 Am. & Eng. Ency., 527.

The general rule (with exceptions not important in this instance) is, "that a promise is not a good consideration for a promise, unless there is an absolute mutuality of engagement, so that each party has the right at once to hold the other to a positive agreement." 1 Parson's Contracts, 374, 449; McKinley v. Watkins, 13 Ill. 140.

If there is one entire consideration for two several contracts and one of these contracts is for the performance of an illegal act, the whole is void. 1 Addison on Contracts (Morgan's Ed.), 439, Sec. 300; Hopkins v. Prescott, 4 C. B., 578.

The contract set up in the third plea is in violation of section 130, chapter 38 of the Revised Statutes of this State, and the demurrer was correctly sustained to it for that reason. By that agreement appellant only bought the privilege of ordering any quantity of coal not in excess of 12,000 tons.

This privilege is only an option, and is most clearly so. Schneider v. Turner et al., 130 Ill. 28.

A privilege is an option. A right or privilege which a party may have to buy or sell to you at a future day is what is termed a gambling contract, or an option within the meaning of the Illinois statute. White v. Barber, 123 U. S. 392.

We can neither read out of the contract, language which the parties put in it, nor into the statute expressions which the legislature, for a manifest purpose, omitted. The contract, tested by the statute, is void, and therefore each count of the declaration obnoxious to the demurrer interposed. White v. Barber, 123 U. S. 392; Osgood v. Bander, 75 Iowa 550; Webster v. Sturges, 7 Brad. 560; Wolcott v. Heath,

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78 Ill. 433; Pickering v. Cease, 79 Ill. 328; Pixley v. Boynton, 79 Ill. 351; Miller v. Bensley, 20 Brad. 528; Terney v. Foote, 4 Brad. 394; Pearce v. Foot, 113 Ill. 228; Lyon v. Culbertson, 83 Ill. 33; Gilbert v. Guager, 8 Bissell (U. S. C.), 244.

The test of whether a demand connected with an illegal transaction is capable of being enforced by law, is whether the plaintiff requires the aid of the legal transaction to establish his case. *Swan v. Scott*, 11 Serg. & Rawle (Penn.) 155; *Thomas v. Brady*, 40 Pa. St. 564, 470; *Scott v. Duffey*, 14 Pa. St. 18; 2 Benjamin on Sales (3d Eng., 4 Am. Ed.), p. 681, Sec. 788, note 2; *Columbia Bank & Bridge Co. v. Haldeman*, 7 W. & S. (Penn.) 233; *Walt v. Green*, 73 Pa. St. 198, 200.

Or whether the case or defense is made out through the aid of the illegal contract. If so, it must fail. *Taylor v. Chester*, L. R., 4 Q. B. 309, 314; 2 Benjamin on Sales, Sec. 788, p. 681 (3d Eng., 4 Am. Ed.); *Gilliam v. Brown*, 43 Miss. 641; *Roby v. West*, 4 N. H. 290; *Welsh v. Wesson*, 6 Gray (Mass.) 505; *Phalen v. Clark*, 19 Conn. 421; *Manchester v. Concord*, 20 Atl. Rep. 383; *Woodworth v. Bennett*, 43 N. Y. 275; *Armstrong v. National Bank*, 133 U. S. 433; *Roberts v. Roberts*, 2 B. & Ald. 367.

An obligation will be enforced, though indirectly connected with an illegal transaction, if it is supported by an independent consideration, so that the plaintiff does not require the aid of the illegal transaction to make out his case. *Armstrong v. American Exchange Bank*, 133 U. S. 434.

The general rule is, that if an agreement is legally void and unenforceable by reason of some statutory or common law prohibition, either party to the agreement, who has received anything from the other party, and has failed to perform the agreement on his part, must account to the latter for what has been so received. Under the circumstances, the courts will grant relief irrespective of invalid agreement, unless it involves some positive immorality, or there are other reasons of public policy why the courts should refuse to grant any relief in the case. 2 Morawetz, Pri-

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vate Corporations, Sec. 721; 2 Chitty on Con., 11th Am. Ed. 976; Lowell v. Boston R. R., 23 Pick. (Mass.) 24, 32; While v. Frankil Bank, 22 Pick. (Mass.) 181-186; Utica Ins. Co. v. Rip, 8 Cow. (N. Y.) 20; Manchester R. R. v. Concord R. R., 20 Atl. Rep. 383.

MR. JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

The action of the court in sustaining a demurrer to the special pleas of set-off was not erroneous. The alleged contract of August 4th set out in the first plea, is void for uncertainty. By it "Minnesota Lumber Company agrees to buy its requirements of anthracite coal for the season of 1886-1887, of the Whitebreast Coal Co., to be furnished as ordered." What its requirements were to be is nowhere defined. The contract furnishes no data from which the coal company could approximate the probable demands which might be made on it; whether one ton or one hundred thousand tons can not be ascertained from the agreement. This uncertainty is not removed by any allegation in the plea. Whether the "requirements" were for consumption in operating a factory or for furnishing the retail trade of a particular town, county, State, or country, or whether for speculation, can not be learned from the contract or any allegation in the plea. Furthermore the agreement does not bind the lumber company to require any anthracite coal. It is, therefore, void for want of mutuality. The general rule is that a promise is not a good consideration for a promise, unless there is mutuality of engagement.

The contract set up in the second special plea, violates section 130, chapter 38 of the Revised Statutes, and is therefore void as being *malum prohibitum*.

"Whoever contracts to have or give to himself or another, the option to sell or buy, at a future time, any grain, or other commodity, stock of any railroad, or other company, or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so in relation to any such commodities, shall be fined not less than ten dollars, nor more

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than one thousand dollars, or confined in the county jail not exceeding one year, or both, and all contracts made in violation of this section shall be considered gambling contracts, and shall be void." Starr and Curtis' Statutes, Vol. 1, page 721.

That the "privilege of ordering any quantity of coal not in excess of 12,000 tons," is only an option, is so clearly established by the reasoning employed by the learned judge who wrote the opinion of our Supreme Court in *Schneider v. Turner et al.*, 130 Ill. 28, that we do not care to more than refer to that case in support of our holding.

To make out its case appellee introduced the written orders of appellant, made proof of shipments of coal on the orders and proved the value of the coal. It showed shipments in August, September, October, November and December, 1886, amounting to 4,176 tons, valued at \$19,739.97, credits amounting to \$10,485.61 and a balance of \$9,254.36, for which last mentioned sum the Circuit Court rendered judgment. There was no dispute as to the quality of the coal delivered, but appellant contended upon the trial that the coal was ordered, shipped and accepted under the terms of the agreements of August 21, 1886, and that inasmuch as such agreement was in violation of that section of the criminal code quoted above, there could be no recovery for the unpaid balance. Such contention is most earnestly argued in this court for a reversal of the judgment. It should be borne in mind that the alleged contract is not declared upon, nor is the suit to enforce it, or to recover damages for a breach of it.

Appellee did not call to its aid the illegal contract to make out its case. It was not necessary to do so. It was only necessary to show that the coal was ordered and delivered and what was the reasonable value of it.

The claim which forms the basis of the suit is perfectly legitimate. The sale and delivery of coal is not illegal. It is only option contracts to buy or sell coal that are prohibited by statute. Although there may be some illegal feature indirectly connected with a transaction involved in a suit, yet

the plaintiff may recover if his cause of action is otherwise legitimate, and he can make out his case without calling to his aid the illegal agreement. The test of whether the demand can be enforced at law is whether the plaintiff requires the aid of the illegal contract to establish his case. *Armstrong v. American Exchange Bank*, 133 U. S. 434; *Thomas v. Brady*, 10 Pa. 164; *Holt v. Green*, 73 Pa. 198; *Congress Co. v. Knowlton*, 103 U. S. 49; *Welch v. Wisson*, 6 Gray 506; *Mosher v. Griffin et al.*, 51 Ill. 184.

We are of the opinion the judgment should be affirmed.

Plano Manufacturing Co. v. A. M. Parmenter.

1. EVIDENCE—*Bill of Exceptions Taken at a Former Trial, When Admissible.*—In order to have admitted the testimony of a witness on a former trial as contained in a bill of exceptions, it must be shown that the testimony of the witness as contained in the bill is correct, as taken at the former trial, and that he is without the jurisdiction of the court.

2. VERDICTS—*When Not to be Disturbed.*—Where the record is free from error as to the admission of evidence and the giving of instructions, and the case has been tried by four juries, all finding the same way, the court, under the circumstances, will not disturb the finding.

Memorandum.—Assumpsit. In the Circuit Court of Peoria County, on appeal from a justice of the peace; the Hon. NICHOLAS E. WORTHINGTON, Judge, presiding. Trial by jury; verdict and judgment for the plaintiff; appeal by defendant. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 18, 1894.

APPELLANT'S BRIEF, ARTHUR KEITHLEY, ATTORNEY.

In Greenleaf on Evidence, Sec. 163, in speaking about the admissibility of the former testimony of a witness, the author says: "It is also received if the witness, though not dead, is out of the jurisdiction, or can not be found after diligent search, or is insane, or sick." *Magill v. Kaufman*, 4 S. & R. (Penn.) 316; *Minns v. Sturdevant*, 36 Ala. 636; *Drayton v. Wells*, 1 N. & McC. 409; *Carpenter v. Graff*, 5 S. & R. (Penn.) 162; *Wilder v. St. Paul*, 12 Minn. 192; *Howard v. Patrick*, 38 Mich. 795; *Dye v. Com.*, 3 Bush (Ky.) 3.

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There are many other authorities holding the same way, including Wharton on Evidence, Sec. 178, and many cases go so far as to admit this character of proof even in criminal cases. *State v. McNeill*, 33 La. Ann. 1032; *People v. Devine*, 46 California 45; 5 Ohio St. 325; 5 Hill 295.

Other States admit such proof in civil cases, but refuse to admit it in criminal cases. *Finn's Case*, 5 Rand (Va.) 701.

WINSLOW EVANS, attorney for appellee.

MR. JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This case has been here twice before and is reported in 32 Ill. App. 633 and 39 Ill. App. 270. The suit was commenced before a justice of the peace by appellant to recover the price of a mower claimed to have been shipped to and received by appellee. We refer to the opinions of this court reported in the 32d and 39th volumes of the Appellate Court Reports for a full statement of the facts. The controversy is exclusively one of fact. Four times has it been submitted to a jury and decided each time in favor of appellee. The judgments heretofore entered were reversed by this court, because of errors committed by the Circuit Court during the progress of the trial. Although we said in our last opinion that the verdict was manifestly against the weight of the evidence, we reversed the judgment for other reasons.

One of the errors as now alleged, is that the court improperly refused to admit the testimony of Wm. H. McCann from a bill of exceptions made on a former trial of the cause.

He was, it was claimed, absent from the State. For two reasons, the court properly refused to admit the testimony. It was not sufficiently made to appear that McCann was without the jurisdiction of the court; nor was it shown that the testimony of McCann as contained in the bill of exceptions was correct, as taken at the former trial.

Although appellant offered an instruction to the effect that the settlement sheet admitted in evidence was presumed to

be correct, and that in order to disprove any statement contained in it, it devolved upon the defendant to do so by a preponderance of the evidence, was the law, its refusal was not error, for the reason that the same proposition was given to the jury in another instruction as modified by the court.

Several instructions given for appellee are criticised as giving undue prominence to certain disputed facts, but we do not think them subject to that objection. We think the record is free from error as to the admission of evidence and the giving of instructions. The appellant has had a fair trial. It is impossible to reconcile the testimony. In the great conflict between the witnesses, the jury has decided just as four other juries had decided, and we do not feel disposed, under the circumstances, to disturb the finding. Judgment affirmed.

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Sarah Bell et al. v. Nels O. Cassem.

1. **DRAMSHOP ACT—Construction of Section 10.**—It was the intention of the legislature in enacting section 10 of the dramshop act, providing that in case any person shall rent or lease to another any building or premises to be used or occupied in whole or in part for the sale of intoxicating liquor, or shall knowingly permit the same to be used or occupied, such building or premises so used or occupied shall be held liable and may be sold to pay any judgment against any person occupying such building or premises, to deal only with owners and those having rentable interests in such building and premises, and not to include those having only contingent interests and who are in no way responsible for the renting or control of the property.

2. **SAME—Mortgagees of Premises Not Liable.**—A mortgagor out of possession, and with none of the covenants in his mortgage broken, is in no position to control the mortgaged property or dictate the renting of it, and is not in any way affected by section 10 of the dramshop act, and in no way responsible for the renting or control of the property by the mortgagee.

Memorandum.—Foreclosure proceedings. In the Circuit Court of Kendall County; the Hon. CLARK W. UPTON, Judge, presiding. Decree for complainants; error by defendants. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 13, 1894.

Bell v. Cassem.

BENJ. F. HERRINGTON, attorney for plaintiffs in error.

RANDALL CASSEM and McDUGALL & CHAPMAN, attorneys for defendant in error.

MR. JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

The defendant in error, Nels O. Cassem, filed his bill in chancery to foreclose a mortgage, executed December 21, 1889, by Albertina Helmuth and Jacob Helmuth, upon certain premises owned by Albertina Helmuth, and known as the "City Hotel" property, Yorkville, Illinois, to secure a loan of \$2,000, made by him to the Helmuths. Sarah Bell and her five children, plaintiffs in error, were made defendants, because of an unsatisfied judgment for \$5,000, recovered by them December 22, 1891, against Jacob Helmuth and Albertina Helmuth, for damages suffered by them by reason of the death of Arthur Bell, husband of Sarah Bell, caused by the sale of intoxicating liquors to him by Jacob Helmuth, who was at that time keeping a dramshop upon the premises.

Sarah Bell interposed an answer, setting up the unsatisfied judgment as a superior lien to the mortgage lien of Cassem, and denying his right to any relief as against herself and the children. The children, by their guardian *ad litem*, B. F. Herrington, filed a similar answer. They also filed a cross-bill, showing that the owner of the premises, Albertina Helmuth, permitted her husband, Jacob Helmuth, to keep a dramshop therein; that the judgment was recovered for damages caused by the selling of intoxicating liquors from the same; that an execution had been levied upon the premises for the purpose of enforcing payment of the judgment, but that a sale had been rendered impracticable by reason of the asserted mortgage lien of Cassem, and that since the execution of his mortgage, Cassem had permitted the premises to be occupied as a dramshop. The cross-bill asked as relief that Cassem's claim be declared subordinate, and removed out of the way of the judgment lien asserted, and that the sheriff be directed to sell under the execution levy.

The court sustained exceptions to the answer, sustained a demurrer to the cross-bill, and rendered a decree in favor of the complainant in the original bill, finding there was due on the mortgage debt \$2,356.45; that the same was a superior lien to that of Sarah Bell and her children, and made the usual order of sale.

The judgment mentioned was recovered under the provisions of Sec. 9 of the dramshop act, and this case involves the construction of that part of Sec. 10, which reads as follows:

"For the payment of any judgment for damages and costs that may be recovered against any person in consequence of the sale of intoxicating liquors under the preceding section, the real estate and personal property of such person, of every kind, except such as may be exempt from levy and sale upon judgment and execution, shall be liable, and such judgment shall be a lien upon such real estate until paid; and in case any person shall rent or lease to another any building or premises to be used or occupied, in whole or in part, for the sale of intoxicating liquor, or shall knowingly permit the same to be used or occupied, such building or premises so used or occupied shall be held liable for, and may be sold to pay any such judgment against any person occupying such building or premises."

It is claimed that that part of the section reading, "such building or premises so used or occupied shall be held liable for and may be sold to pay such judgment," renders the judgment lien superior to the mortgage lien of Cassem, notwithstanding the mortgage was given about five months before the cause of action accrued, and two years before the judgment was rendered.

A careful consideration of the section, together with the one preceding it, leads us to conclude that it was the intention of the legislature in enacting the provision in question, to deal only with owners, and those having rentable interests in the building and premises. We do not think that it was intended to include those who have only a contingent interest, and who are in no way responsible for the renting or control of the property.

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A person can not be said to permit premises to be used for the sale of intoxicating liquors unless such person has some control over and disposition of the property at the time. A mere mortgagee, out of possession and with none of the covenants in the mortgage broken, is in no position to control the property or dictate the renting of it. His interest is contingent, depending upon whether the mortgagor performs the covenants in the mortgage. To give the statute the construction contended for, would tend to render titles insecure. No one could safely accept a mortgage to secure a loan, or purchase real estate on the faith of its appearing, from the public records, that the land was clear from liens and incumbrances.

Defendant in error, at the time the liquor was sold and the judgment recovered, had but a contingent interest in the property. The conditions in the mortgage had not been broken, and he had no right to control the renting of it. The views herein expressed are in harmony with the previous opinion of this court as expressed in *Castle v. Fogarty*, 19 App. 443, and also with those of the Supreme Court of the State of Ohio. *Bellinger v. Griffith*, 23 Ohio St. 619. Decree affirmed.

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J. P. Larson v. Central Railway Co.

1. **NEGLIGENCE—What Makes a Prima Facie Case—Fallen Electric Wires.**—The proof of an injury occurring as the proximate result of an act which under ordinary circumstances would not, if done with due care, have injured any one, is enough to make out a presumption of negligence. So when a company permitted a broken electric wire to hang loose in the streets, proof of an injury resulting makes out a *prima facie* case.

2. **SAME—Use of Dangerous Agents.**—In the use of dangerous agents, like electricity, for the propelling of street cars carrying passengers, the law requires a high degree of care commensurate with the danger.

Memorandum.—Trespass to personal property. In the Circuit Court of Peoria County, on appeal from a justice of the peace; the Hon. NICHOLAS E. WORTHINGTON, Judge, presiding. Trial by jury; verdict

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and judgment for defendant; appeal by plaintiff. Heard in this court at the May term, 1894. Reversed and remanded. Opinion filed December 13, 1894.

APPELLANT'S BRIEF, ARTHUR KEITHLEY, ATTORNEY.

Appellant contended that the proof made out a *prima facie* case.

The plaintiff while walking on the sidewalk was burned by a cinder falling from an elevated railroad engine, and the court held that, presumptively, the defendant was guilty of negligence. Weidmur v. N. Y. Elevated Railway Co., 41 Hun 284; Holbrook v. Utica R. R. Co., 12 N. Y. 236; Field v. N. Y. C. R. R. Co., 32 N. Y. 339; Hall v. R. R. Co., 14 Cal. 387; Ellis v. R. R. Co., 2 Iredell 138.

The very nature of the accident may, of itself, and through the presumption it carries, supply the requisite proof of negligence. Wharton on Negligence, Sec. 421.

There are cases where the maxim *res ipsa loquitur* (the thing speaks for itself) is directly applicable, and from the thing done or omitted, negligence or care is presumed. 16 Am. and Eng. Ency. of Law, 448.

Even the injury itself often affords sufficient *prima facie* evidence of negligence. Cooley on Torts, 2d Edition, page 794; Uggla v. West End Street Railway Company (Mass.), 35 N. E. Rep. 3326.

APPELLEE'S BRIEF, STEVENS & HORTON, ATTORNEYS.

The instructions asked on behalf of the defendant stated the law correctly. There is no presumption of negligence from the mere happening of an injury, and the burden of proof was upon the plaintiff to show negligence in some one of the particulars mentioned in the instructions. Nichols v. City of Minneapolis (Minn.), 23 N. W. Rep. 868; Sack v. Dolese, 137 Ill. 129; 2 Thompson on Negligence, 1227; Buswell on Personal Injuries, 158; Booth on Street Railway Law, 439; North Side Street Railway Company v. Want (Tex.), 15 S. W. Rep. 40; Potts v. Chicago City Ry. Co., 33 Fed. Rep. 610; Hazel v. People's Passenger Railway Co., 132 Pa. St. 96; Philadelphia City Passenger Ry. Co. v.

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Henrice, 92 Pa. St. 431; Roller v. Sutter Street Ry. Co., 66 Cal. 230; Cosulich et al. v. Standard Oil Co. (N. Y.), 25 N. E. Rep. 259; W. St. L. & P. Ry. Co. v. Lock (Ind.), 14 N. E. Rep. 391; Walker v. C., R. I. & P. Ry. Co. (Ia.), 33 N. W. Rep. 224; Huff v. Austin (O.), 21 N. E. Rep. 864; Wiedmur v. N. Y. Elevated Railroad Co. (N. Y.), 21 N. E. Rep. 1041; The Nitro-Glycerine Case, 15 Wall. (U. S.) 524.

The ordinance of the city of Peoria granting the franchise to the Central Railway Company is in the nature of a contract between the municipality and the company, and does not confer any right of action upon an individual for the private wrong, there being no privity of contract between such individual and the grantee of the franchise. Gardner v. Detroit Street Ry. Co. (Mich.), 58 N. W. Rep. 49; Beck v. Kittaning Water Co. (Pa.), 11 Atl. Rep. 300; House v. Houston Water Works Co. (Tex.), 22 S. W. Rep. 277; Button v. Green Bay & Fort H. Water Works Co. (Wis.), 51 N. W. Rep. 84; Mott v. Cherryvale Water & Manufacturing Co. (Kas.), 28 Pac. Rep. 989; Becker v. Keokuk Water Works (Ia.), 44 N. W. Rep. 694.

Plaintiff can not now complain of errors in defendant's instructions. He submitted his case to the jury as an action of tort for negligence and the defendant's instructions were drawn upon that theory. Neither can he ask for reversal on the ground of rights he may possibly have under the ordinance, having first tried his case as action of tort. I. C. R. R. v. Latimer, 128 Ill. 172; Springer v. City of Chicago, 135 Ill. 552; McMahon v. Sankey, 35 Ill. App. 343; Chicago Anderson Pressed Brick Co. v. Reininger, 41 Ill. App. 324; Willard v. Swanson, 22 Ill. App. 424; Barker et al. v. Livingston Co. National Bank, 30 Ill. App. 591; Consolidated Coal Co. v. Haenni, 146 Ill. 614; Chicago v. Moore, 40 Ill. App. 334; Rockford v. Falver, 27 Ill. App. 607.

MR. PRESIDING JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This was a suit commenced by appellant before a justice of the peace to recover the price of a horse killed by an

electric shock from a wire charged with electricity loose in the streets, claimed to be caused by the negligence of appellee, the owner and conductor under charge of an electric street railway.

The appellant recovered before the justice, but on appeal to the Circuit Court and trial by jury, a verdict was found in favor of appellee and judgment rendered against appellant for costs; from this judgment this appeal is taken.

The facts of the case are in substance as follows:

Charles Larson, son of appellant, was driving the latter's horse attached to a delivery wagon, appellant being a grocer, and the horse stepped on an electric wire and dropped dead. Appellee had power by ordinance of the city of Peoria to operate an electric railway in the street at the place of the accident. The wire on which the horse stepped rested on the trolley wire directly over the track and car. The wire, before it was broken, was fastened to a pole at the corner of Washington and Main streets toward the bank, and went diagonally across the street; the horse was worth \$150.

The driver did not see the wire till the horse was down; the wire was hanging down on the track and in the middle of the street. The wire had been hanging above the appellee's trolley wire at the corner above named and had been for two years. While the electric car was coming up Main street the trolley pole slipped off the trolley wire on which it ran and flew up and against the suspension wire and broke it, so it fell down, where it was stepped on by the horse. It had been down three or four minutes before it was stepped on by the horse. The conductor did not know that the trolley was off until called to by a bystander. The trolley was out of place, no one giving any attention and no heed as to whether it had done any damage when off at a place where a wire that might be broken was known to be.

Prima facie the accident was due to the negligence of the appellee, and it offered no evidence to rebut such proof.

The main question of law in this case is whether appellant, after making the proof he did, was bound to go further

Larson v. Central Ry. Co.

and show negligence of the appellee in the premises, by additional proof.

The rule of law as established in this State, however it may be in other States, is "that proof of an injury occurring as the proximate result of an act, which under ordinary circumstances would not, if done with due care, have injured any one, is enough to make out a presumption of negligence. And this is to be held to be the rule even where no special relation, like that of passenger and carrier, exists between the parties." *North Chicago St. Ry. Co. v. Cotton*, 140 Ill. 486, and cases there cited. In the case of the use of a highly dangerous agent, like electricity, for the propelling of street cars for the carrying of passengers, the law requires a high degree of care commensurate with the danger. If a wire highly charged with electricity is allowed to hang loose in the street as this was, where people are traveling in the streets, the result to pedestrians or horses coming in contact with it is instant death. Therefore a party who employs such agency should use the highest degree of care to avoid exposing the public to such danger. If such care had been exercised, either this wire would not have been broken by the trolley pole, or if broken, the conductor would have discovered it and the wire been instantly removed. Instead of this the street car conductor operating the car in question was not aware of the accident until called to and informed that his trolley pole was off the wire. Then instead of examining whether any damages had been done by it he simply replaced the pole and moved on.

The appellee insists that notwithstanding the instructions on its part might be faulty, which it disputes, yet, the appellant is estopped from complaining, for the reason, he asked instructions announcing the same rule of law, which the court gave. We do not think appellant's instructions are subject to this criticism.

It is true, on his part the jury was instructed that if the defendant was either careless or negligent in letting the wire remain in the street after the same was broken and the horse injured thereby, or the jury believed from the evi-

dence that defendant carelessly or negligently operated its cars in such a way as to cause the accident, etc., which resulted in the death of the horse, etc., then the jury should find for the appellant.

While this form of instruction was strictly correct as matter of law, it did not tell the jury that such negligence might not be inferred or should not be inferred, *prima facie*, from the undisputed evidence, and was not as favorable to the appellant as it might have been; yet, this did not, by implication or otherwise, authorize the court to go further and instruct the jury as it did in other instructions given at the instance of appellee, that it was not enough to show the "wire was broken by one of the cars and that alone would not render the defendant liable, * * * but appellant must show by facts and circumstances that such act was negligence, and the jury had no right to presume it was negligence, and if there are no facts and circumstances in evidence on that point, then the jury should find defendant not guilty."

This was the substance of the fourth instruction, and the jury would clearly understand that the facts and circumstances of the tearing down of the wire and not removing it, were not in themselves, as shown by the evidence, sufficient to raise a presumption of negligence, but other evidence of negligence must have been shown to render appellee liable.

The same fault is in instructions given for appellee Nos. three, five and six.

It will not be necessary to notice the point raised over the city ordinance further than to say we think the point was not raised in apt time.

Finding that on the evidence, if not rebutted, which it was not, there should have been a verdict for appellant, the judgment of the court below is reversed and the cause remanded.

Meinke v. Nelson.

Fred Meinke v. Joseph Nelson and Lee Nelson.

56	269
81	597
56	269
87	469

1. **GROWING CROPS—Personal Property, When Sold Separate and Distinct from the Land.**—While growing crops partake of the quality of realty so far as to pass by a deed of the land as incident to it, yet when sold separate and distinct from the land, they are personal property. When the sale is complete both title and possession vests in the purchaser.

2. **TRESPASS—When the Action De Bonis Asportatis Lies.**—On December 1st, N. leased a farm of M., to take possession March 1st. Upon the farm were forty acres in winter wheat. N. agreed to pay \$150 for it in addition to the rent on March 1st. While M. was still in possession, he turned his horses on the wheat and damaged it. In an action for the same it was held that N. could recover under a count *de bonis asportatis*, but not under a count *quare clausum fregit*, as it was stipulated that M. should have possession of the farm until March following.

3. **ESTOPPEL—Of Vendee after Paying for Personal Property—Trespass by Vendor.**—A vendee is not estopped from claiming damages of a vendor in trespass to personal property while in the possession of the vendor, because he pays the purchase price for the same after the damage is done.

4. **PRACTICE—Filing Additional Counts.**—The court has authority, under the practice act, to allow the plaintiff to file additional counts after a verdict has been rendered.

5. **DAMAGES—When Excessive, in Trespass.**—A verdict in damages in an action of trespass *de bonis asportatis*, the amount of which can be sustained upon no other theory than that the plaintiff is entitled to vindictive damages, where the evidence does not justify the awarding of vindictive damages, is excessive.

Memorandum.—Trespass to personal property. In the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding. Declaration *de bonis asportatis*; pleas, general issue and license; trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1894. Reversed and remanded for excessive damages. Opinion filed December 18, 1894.

RICHOLSON & SEELEY, attorneys for appellant.

APPELLEES' BRIEF, H. C. WILEY AND BREWER & STRAWN,
ATTORNEYS.

Appellees contended that there is no technical reason why justice should not prevail under the count *de bonis asporta-*

tis. The law is well settled that growing crops are so far personal property that they may be sold and transferred by parol, and upon a sale both title and possession vest in the purchaser without any formal act of possession. *Bull v. Griswold*, 19 Ill. 631; *Ogden v. Lucas*, 48 Ill. 494; *Ticknor v. McClelland*, 84 Ill. 471; *Thompson v. Wilhite*, 81 Ill. 356; *Graff v. Fitch*, 58 Ill. 375; *Dunn v. Ferguson*, 1 Hayes, 542 (Stephen's N. P. 1971); *Backenstoss v. Stahler*, 33 Pa. St. 251; *Davis v. McFarlane*, 37 Cal. 634; *Marshall v. Ferguson*, 23 Cal. 65; *Robbins v. Oldham*, 1 Duvall (Ky.) 28; *Hershey v. Metzgar*, 90 Pa. St. 217; *Green v. Armstrong*, 1 Denio (N. Y.) 550.

MR. JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

Appellee leased from appellant, by written lease, dated December 1, 1891, a farm of 296 acres for five years from March 1, 1892, at a rental of \$1,200 per year. There were forty acres in winter wheat upon the place, and while negotiating for the lease it was agreed that appellees should pay \$150 for the wheat in addition to the rental for the land, on the 1st of March, 1892. Appellant remained in possession of the place until that date, when appellees took possession, and in a few days paid the \$150 for the wheat.

Within the same inclosure with the wheat were ninety acres of corn. As soon as appellant gathered his corn, which was in December, he turned some fourteen or sixteen horses and colts into the inclosure, where they remained the greater part of the winter, feeding and tramping upon the wheat to such an extent as to destroy about half of it.

He contends that the transaction with reference to the wheat was not a mere sale of growing crops, but was an agreement to take the growing crop according to valuation as an incident to the leasing and in part consideration thereof. In other words, that the growing wheat passed with the land under the lease. On the other hand, it is contended that the purchase of the wheat was no part of the lease, and was made over a month before the lease was. Under that contention it was, of course, proper to hear

parol evidence as to what the contract was relating to the wheat. The effect of such evidence would not be to contradict or vary the terms of the lease, because the wheat was not even mentioned in that instrument.

The question was fairly presented to the jury whether the contract relating to the wheat was separate and distinct from the lease, and the testimony of appellees seems sufficient for that purpose. At all events, the jury so found. If the jury was correct, then it was a contract for the sale of a growing crop, and the wheat was therefore personal property. While growing crops partake of the quality of realty so far as to pass by a deed of the land as incident to it, yet when sold separate and distinct from the land they are personal property. When the sale is complete, both title and possession vest in the purchaser. *Bull v. Griswold*, 31 Ill. 631; *Graff v. Fitch*, 58 Ill. 375; *Thompson v. Wilhite*, 81 Ill. 356; *Ticknor v. McClelland*, 84 Ill. 471.

That appellant is liable in trespass for turning his stock upon the wheat which he had sold to appellees, we entertain no doubt. Perhaps there could be no recovery under counts *quare clausum fregit*, as it was stipulated that appellant should have possession of the entire farm until March, but certainly there could be under counts *de bonis asportatis*. While the second count of the declaration is rather inartificially drawn, it partakes so far of the nature of a count *de bonis asportatis* as to support a recovery. After the verdict three additional counts were, by leave of the court, filed. They were sufficient to support the verdict.

Appellees did not lose their right to bring suit because the contract price was not paid on the first of March as stipulated. It was paid a few days afterward, and was accepted as a sufficient compliance with the contract.

Nor are they estopped from claiming damages in trespass because they paid the price after the trespass was committed. The wheat was sold on a credit, and when the terms of the contract were agreed upon, and nothing remained to be done except the payment of the contract price, which was to be made at a stipulated time in the future, appellees had the

same right to sue in trespass *de bonis asportatis* that they would, had the money been paid when the trespass was committed.

It is contended that the court improperly permitted the three additional counts to be filed after the verdict. The statute gave him authority for so doing. No error was committed in giving or refusing instructions.

We are of the opinion, however, that the damages awarded are excessive. After the wheat matured, appellees harvested 504 bushels and sold it for \$252—fifty cents per bushel. They claim this was of an inferior quality, rendered so by the pasturing. But if the high estimate of the value of the whole before it was pastured, of \$400, as made by some of appellees' witnesses, was fair, then it is evident the verdict is nearly double what it should be. And this conclusion is reached after considering the expense of harvesting and marketing the 504 bushels sold. The verdict could be sustained upon no other theory than that appellees were entitled to vindictive damages, and the evidence does not justify the awarding of vindictive damages.

For the reason that the damages are excessive, the judgment is reversed and the cause remanded.

Kingman & Co. v. E. B. Meeks.

1. **CONTRACTS**—*Sale of a Threshing Machine, Entire.*—A contract of sale of a self-feeding threshing machine, consisting of an engine, separator, self-feeder, etc., for the sum of \$1,825, although containing a provision that if the defective machinery can not be made to fill the warranty, it may be returned, is an entire contract, and the self-feeder having failed to fill the warranty, the purchaser had a right to return the machine as not filling the warranty.

2. **SAME**—*When Entire.*—When the things to be furnished by the vendor are certain and fixed, and are described in the contract of sale, and the consideration for the whole is single and entire, the contract is entire, and no part of the consideration can be recovered in an action on the contract, until all the things to be furnished for such consideration have been furnished.

3. WARRANTY—*Breach of—Return of Goods Excused.*—Where a contract of sale of a machine contains provisions that if it does not fill the warranty it may be returned, the vendee is not required to return it to any particular place after the vendor refuses to receive it.

Memorandum.—Assumpsit. In the Circuit Court of Kane County; the Hon. HENRY B. WILLIS, Judge, presiding. Declaration on the contract hereafter set forth. Plea of general issue with notice that defendants will insist: That the alleged contract mentioned in declaration and the execution thereof by the defendant were obtained by the fraudulent misrepresentation of plaintiff and its agent; that the self-feeder had been sold in different parts of the State of Illinois and other States, and was a success in every way; that the machines mentioned in contract were and each of them was first class in every respect and would do first class work, and had been tried and found to be perfect and suitable for the purposes stated; whereas said representations were each false, as plaintiff and its agent well knew. That the clause contained in said contract referring to warranty related to the verbal warranty of plaintiff and its agent, and was to the effect that said feeder would do good work; that the machines and each of them would do good work, and that the machines and each of them and the work done by them should be first class and satisfactory to defendant; that said feeder or any of the machines did not and would not, after due trial, do good work that was first class or satisfactory to the defendant; that the plaintiff was duly notified; that defendant refused to accept the machines or any of them, and that they were held subject to the order of the plaintiff. Trial by jury; verdict and judgment for defendant; appeal by plaintiffs. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 13, 1894.

Copy of contract sued upon:

Please furnish or ship for the undersigned, in care of Hunt and Anderson, to Elburn, Illinois, machinery as follows:

1 7½ self steering Russell Eng. with fixtures; 1 36x54 cyclone separator, 18 ft. D. K. iron wheels; 1 Russell & Co. feeder; 1 90 gal. steel tank front of Eng.; 1 Automatic 4 wheel stkr.; 1 inch Blakely jet pump; 16 ft. hose; 1 telescope weigher; 1 main drive belt 150 ft. rubber, endless; 2 12 4 duck canvas separator, 10 feet, 1½ horse; 1 No. 2 Dodge injector; chime whistle; also fixtures and free extras as provided in price list.

I, the undersigned, agree to receive the above f. o. b.

Elburn, Ills., subject to the conditions named below, and further agree to pay to your order on delivery the sum of eighteen hundred and twenty-five dollars, as follows:

Cash September 1, 1892, \$925; note due January 1, 1893, \$900.

As a condition hereof it is fully understood and agreed:

1st. That this order is given subject to the acceptance of Kingman & Co., and that no promises, whether of agent, employe, or attorney, in respect to the payments, security or to the machinery named will be considered binding unless made in writing and ratified by the home or branch office.

4th. The above articles are warranted to be of good material, well made, and with proper management, capable of doing as good work as similar articles of other manufactures. If said machinery or any part thereof shall fail to fill the warranty, written notice shall be given to Kingman & Co., Peoria, Ill., and to the party through whom the machinery was purchased, stating wherein it fails to fill the warranty, and time and opportunity and friendly assistance given to reach the machinery and remedy any defects. But if the purchasers fail to make it perform through improper management, or lack of proper appliances, or neglect to observe the printed or written directions, then the said purchasers are to pay all necessary expenses incurred. If the defective machinery can not then be made to fill the warranty, it may be returned by the undersigned to the place where received, and another furnished on the same terms of warranty, or money and notes to the amount represented by the defective machine shall be returned, and no further claim be made on Kingman & Co.

Continued possession or use of the machine after the expiration of time named above shall be conclusive evidence that the warranty is fulfilled to the satisfaction of the undersigned, who agree thereafter to make no further claim under the warranty. In case any casting fails through undeniable defect in its material within two months from the date of purchase, such defective piece shall be replaced with-

Kingman & Co. v. Meeks.

out charge, except freight or charges; but on any claim for replacement of defective castings, the defective pieces shall be presented to Kingman & Co., or to the dealer through whom the machinery was ordered, and shall clearly show the defects. Defects or failure in one part shall not condemn or be the grounds for claiming renewal, or for the return of any other part. This warranty to be invalid and void in case the machine is not settled for when delivered, or if this warranty is changed, whether by erasure, addition or waiver.

E. B. MEEKS.

BOTSFORD & WAYNE and ARTHUR KEITHLEY, attorneys for appellant.

APPELLEE'S BRIEF, CHARLES WHEATON AND E. H. GARY,
ATTORNEYS.

Whether a contract is entire or severable, is ordinarily determined by inquiring whether or not it embraces one or more separate and distinct subject-matters, or whether the obligation it imposes is due at the same time and to the same person, and whether the consideration is entire, or distinct to each subject-matter and person. *Highham v. Harris*, 108 Ind. 246; *I. B. & W. R. Co. v. Koons*, 105 Ind. 507; *Rainhott v. East*, 56 Ind. 579.

If the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed, or it is left to be implied by law, such contract will generally be severable. *Parsons on Contracts*, 517.

An entire contract can not be apportioned, and the performance of it enforced in fragments. *Crosby v. Loop*, 14 Ill. 330; *Ill. Cent. R. R. Co. v. Demars*, 44 Ill. 292; *Rockford, R. I. & St. L. R. R. Co. v. Lent*, 63 Ill. 288; *Hartzfeld v. Converse*, 105 Ill. 534.

MR. JUSTICE CARTWRIGHT DELIVERED THE OPINION OF THE COURT.

Hunt & Anderson were local agents of appellant at Elburn, Illinois, and T. B. Strosnyder was its traveling

salesman. On May 16, 1892, Strosnyder obtained from appellee a written order for a self-feeding threshing machine, consisting of an engine, separator, feeder, etc., to be shipped to Elburn in care of said local agents, which appellee agreed to receive at that place. The price was \$1,825, and notes were to be made and secured by chattel mortgage.

It was provided in the order, among other things, that the articles were warranted to be of good material, well made, and with proper management, capable of doing as good work as similar articles of other manufacturers; that if said machinery or any part thereof should fail to fill the warranty, notice should be given, and time, opportunity and friendly assistance given to reach the machinery and remedy any defects; that if the defective machinery could not then be made to fill the warranty, it might be returned to the place where received and another furnished on the same terms of warranty, or money or notes to the amount represented by the defective machinery should be returned; that defects or failure in one part should not condemn or be the grounds for claiming renewal, or for the return of any other part, and that the notes for the price should be left at Kane county bank until the machine should fill the warranty, after being used in rye and oats.

Hunt & Anderson were to have a commission of twenty per cent on the sale as local agents, and when the machine arrived at Elburn they and appellee unloaded it and took it to appellee's place in Elburn. Notes were made for the purchase price, one for \$925, due on or before September 1, 1892, and the other for \$900, due on or before January 1, 1893, and on each note the following indorsement was written: "This note to be left with the Kane county bank until E. B. Meeks has tried the machine and sees that it fulfills the condition of the warranty." The notes were left at the bank and a chattel mortgage was made and signed but not acknowledged, and was also left there.

Appellee had become apprehensive that the self-feeder would not be a success, before the machine arrived; and had expressed to Anderson his fears that the machine would not

be of any use to him on that account. Hunt took the machine into the field, and it was tried, but would not work. Strosnyder had told appellee, for the purpose of obtaining the order, that he knew positively that the self-feeder would work and that it had been sold to different parties and had given entire satisfaction. That statement was false, and it is admitted by appellant that the self-feeder was a mere experiment and proved an entire failure. There were other self-feeding threshing machines in operation in the vicinity which were successful and operated satisfactorily. When the machine was shipped, appellant sent with it a platform and appliances for feeding by hand, which constituted no part of the machine as ordered, and appellant's agents wanted appellee to let them alter the machine to a hand-feed machine and have him keep it, but he refused to do so. The machine was taken back to appellee's shed by his employe and the local agent sent to appellant for an expert. The machine was afterward taken out twice and tried, but the parties sent by appellant failed to make it work. Appellee told each of them that he would not have the machine and it was put back in his shed and remained there.

Appellee wrote to appellant that the machine had failed to fill the warranty, that the self-feeder was worthless, and specifying other alleged defects, and that he should deliver the machine to Hunt & Anderson or leave it where they might say, and demand the return of his notes. Afterward he wrote again that Hunt & Anderson claimed they had nothing to do with the machine; that it was subject to appellant's order and that he wished it removed. Appellant made no reply to either of his letters, but began this suit and declared upon the written order for the machine, adding the common counts.

Appellee pleaded the general issue and gave notice that he would prove that the contract was obtained by false and fraudulent representations; that the clause in the contract referring to warranty related to a verbal warranty, and that both the written and verbal warranty failed, and he offered to return the machine but acceptance was refused. There

was a trial and appellee obtained a verdict and judgment in his favor.

Appellant contends that the court erred in admitting evidence of false statements made by Strosnyder in obtaining the order and of a verbal warranty made by him, together with his statement that the clause in the order providing for leaving the notes in the bank until it was seen that the warranty was filled, related to that verbal warranty. Appellee exacted a specific warranty which was embraced in the writing, and parol evidence was not admissible to prove that Strosnyder at the same time said that he knew that it would work, and that it had given satisfaction to others, or that he then verbally warranted the machine. Benjamin on Sales, Sec. 942. But the admission of the evidence did no harm in this case in the view that we take of the contract, since the failure of the written warranty was as absolute as that of the supposed verbal warranty, and the contract gave to appellee a right of return upon such failure as complete as the right to rescind a sale and return property on account of fraud.

But it is also insisted that the court was wrong in construing the contract and in refusing instructions which stated that the contract was divisible; that under its terms appellee was bound to return such parts as did not fill the warranty and keep and pay for all such parts as did, and that if the machine filled the warranty, except as to the self-feeder, which was admitted to be worthless, the jury must find a verdict for the contract price, less the amount to be deducted for the self-feeder.

Proof was offered on the trial that there was a list price of the self-feeder and that such price was \$200, but the proof was not admitted. It is contended that the contract was divisible and that appellant could recover to the extent of its performance. This contention is based upon the provisions in the order, that if defective machinery could not be made to fill the warranty it might be returned and another furnished on the same terms of warranty, or money and notes to the amount represented by the defective machine should

be returned, and that defect or failure in one part should not condemn or be grounds for claiming renewal, or for the return of any other part.

The things to be furnished by appellant were certain and fixed and were described in the contract, and the consideration for the whole was single and entire. Ordinarily no part of such a consideration can be recovered in an action on the contract until all the things to be furnished for such consideration have been furnished. The contract made no apportionment of the price among the several articles and afforded no means for such apportionment. The subject-matter of the contract was a threshing machine, although the separate parts were specified, and the machine was to thresh grain, and rye and oats were especially named. That fact is to be considered in determining whether the parties manifested an intention in their contract that appellee should pay for such parts as might be furnished. If such was the intention he might get no threshing machine, but be compelled to pay for the hose, belt or whistle named in the order. The failure was in an essential part of a self-feeding threshing machine, and the consideration being single for the entire machine, we think that the court was right in excluding the evidence that there was a list price for that part, and in refusing to instruct the jury as requested. There were other defects claimed to exist in the machine which might perhaps have been remedied, but the utter failure of the feeding apparatus was irremediable, and without it appellee did not have the threshing machine which appellant was to furnish to him.

The point is also made that appellee should have returned the machine to Elburn, where it is said that he received it. The machine was shipped to Elburn in care of appellant's agents, Hunt & Anderson, and they, together with appellee, unloaded it. After the trials by appellant's agents it was left in appellee's shed. But if it was delivered to appellee at Elburn when taken off the cars and set up rather than at the shed where it remained, a refusal by Hunt & Anderson to receive it and the failure of appellant to reply to his letter

notifying them of such refusal or to give any direction what to do with it, relieved him from any further duty concerning the return of it.

It appears to us that justice has been done, and the judgment will be affirmed.

**John Mitchell v. J. H. Goodell, Administrator of the
Estate of Elizabeth Beckwith.**

1. **WITNESSES**—*Disability Not Removed by Amendment of the Suit.*—A person presented a claim in the Probate Court as a claimant, swore to it as such, and afterward and before trial amended the claim so as to make it the claim of another person, who being dissatisfied with the judgment took an appeal to the Circuit Court. On the trial in the Circuit Court the original claimant was offered as a witness. *Held*, that he was incompetent. A suit can not be so amended as to remove the disability of a person to testify.

Memorandum.—Claim in probate. In the Circuit Court of La Salle County, on appeal from the Probate Court; the Hon. CHARLES BLANCHARD, Judge, presiding. Hearing and disallowance of claim; appeal by claimant. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 18, 1894.

BREWER & STRAWN, attorneys for appellant; E. J. KELLY and BURKE & TRAINOR, of counsel.

PETER M. McARTHUR and SNYDER, STEAD & ELDREDGE, attorneys for appellee.

MR. JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit Court, disallowing the claim of appellant against the estate of Elizabeth Beckwith.

The claim was originally filed in the Probate Court by appellant and one M. P. Mitchell, a son of appellant, who had been his partner in the dry goods and grocery business at Marseilles, Ill. It was for a balance claimed to be due

on a settlement made in 1885, and for a judgment against E. B. Beckwith, assumed by the deceased, amounting in all to \$506.61. The oath attached to the claim was made by M. P. Mitchell. Before a trial, and after the claim had been filed nearly a year, it was amended so as to make it a claim of appellant against the estate, and for balance due on account. A trial in the Probate Court resulted in a judgment in favor of appellant for \$441, but the Circuit Court on appeal disallowed the entire claim.

From the evidence it appears that while M. P. Mitchell and his brother, Peter M. Mitchell, were carrying on a mercantile business at Marseilles, the deceased and her husband, E. B. Beckwith, were conducting a boarding house in the same place. An account was opened with E. B. Beckwith. Peter retired from the business December 24, 1883, and his father, the appellant, succeeded him and the business was then conducted by appellant and M. P. Mitchell. E. B. Beckwith continued to trade with them until 1885. On the 14th of May, 1886, the business was discontinued, appellant taking the assets and paying off the liabilities.

Appellant claimed the estate was liable, because the goods were purchased for Mrs. Beckwith's own use, because she used them and promised to pay for them, and because they were used in defraying the necessary expenses of the family which made them chargeable against her under Section 15, Chapter 68, Starr and Curtis' Annotated Statutes. He failed to support either one of these contentions by the evidence.

M. P. Mitchell was introduced as a witness, and appellant sought to prove by him the purchase of the goods charged, and lay the foundation for the introduction of certain pages of a ledger kept by the firm. But the Circuit Court sustained an objection to his testimony. That the court erred in so ruling, is the chief contention urged here.

It is insisted that M. P. Mitchell was a competent witness because he was not a party to the suit and testified that he had no interest in the claim. It does not appear from the evidence that the claim ever was assigned. The firm became involved, appellant borrowed money, paid off the liabilities

and took the assets. Indeed, this very witness swore to it as a claimant, when first presented. The evident purpose in so amending it as to leave him out as a party and have its further prosecution conducted in the name of appellant, was to enable him to testify. The statute can not be whipped around in such a manner. To allow him to testify under the circumstances would do great violence to the spirit and intention of the legislature.

It is further insisted that M. P. Mitchell was a competent witness to testify to the book account as provided by Sec. 3, Ch. 51, R. S., relating to evidence, and that the court erred in sustaining an objection to his testimony when it was sought to lay the foundation for the introduction of certain pages in the ledger. It does not appear that the book containing the pages was a book of original entry. The court properly denied his testimony for that reason. Again, the entries made did not purport to be against the deceased, but against her husband, E. B. Beckwith.

We see no reason for disturbing the judgment of the Circuit Court. Judgment affirmed.

Joseph M. Watte v. H. Leroy Thayer.

1. PRINCIPAL AND AGENT—*When the Principal is Not Liable.*—If the principal and agent are both known to the party dealing with an agent, and exclusive credit is given to the agent, the principal will not be liable for his contracts.

Memorandum.—Assumpsit. In the Circuit Court of Will County: the Hon. DORRANCE DIBELL, Judge, presiding. Trial by jury; verdict and judgment for defendant; appeal by plaintiff. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 13, 1894.

FRANCIS A. RIDDLE and MEERS & SPRAGUE, attorneys for appellant.

C. W. BROWN, attorney for appellee.

Watte v. Thayer.

MR. JUSTICE CARTWRIGHT DELIVERED THE OPINION OF THE COURT.

Appellant, who did business under the name of Elmen-dorf, Watte & Co., as a commission merchant on the board of trade in Chicago, brought this suit against appellee to recover losses on 75,000 bushels of oats bought by appellant in July, 1891, on orders of H. S. Carpenter & Co., of Joliet, Illinois, for them, and afterward sold at a loss amounting, with charges and expenses, to \$6,106.15, claiming that appellee was the principal, undisclosed at the time of the purchase, for whom H. S. Carpenter & Co. were acting as agents, and therefore liable for the loss. Appellant was defeated on a trial in the Circuit Court.

H. S. Carpenter & Co. were grain dealers at Joliet, having several warehouses and engaged in the grain business in all its forms. They dealt in options and bought and sold grain for future as well as for immediate delivery. In their business through the board of trade they had about 300 customers in Illinois, Iowa, Missouri, Kansas and Nebraska. They had a telegraph instrument in their office at Joliet, and gave orders from there for purchases and sales. The volume of their trade was large, and they had an agreement with plaintiff by which they were to send all their business to him to be executed on the board of trade, and were to keep their account good to the closing of the market each day by the payment of a sight draft on them the following day. There was expense to be borne by them in telegraphing and keeping advised as to the market, etc., and they were to have half of the commission. In July, 1891, among other purchases and trades made by plaintiff for H. S. Carpenter & Co., he bought at various times oats, amounting to 90,000 bushels for July delivery. No other person was known in the purchase of the oats. The oats were delivered to plaintiff July 31, 1891, and notice was given to H. S. Carpenter & Co. on the same day that the oats had been taken in, paid for and insured on their account. The oats were sold out in August, 1891; 5,000 bushels on the 13th, 75,000 bushels on the 15th, and the remaining 10,000 bushels on the 20th. Statements of the purchases and sales were

sent to H. S. Carpenter & Co., showing losses with which they were charged. It is claimed in this suit that H. S. Carpenter & Co. were acting as agents of defendant as to 75,000 bushels of said oats.

In support of that claim it was proved on the trial that defendant went to Chicago, July 31, 1891, bearing a letter from H. S. Carpenter & Co. to M. Anderson, the floor trader of plaintiff, asking him to inform defendant of the news and markets, and to execute any and all orders he might give for their account; and on that occasion the defendant told Anderson and plaintiff that 75,000 bushels of the oats belonged to him. The oats were bought in lots of 5,000 bushels, and on the accounts of each purchase and sale sent to H. S. Carpenter & Co., they wrote a letter or name, putting the letter "T." to indicate defendant on those where it is claimed the transaction was for him, and writing "Huston" or "H. S. C." on the others to show what persons they were for. On the general statement they also wrote "Thayer" opposite the same lots marked with "T." H. S. Carpenter & Co. made out accounts of the several purchases and sales alleged to have been for defendant as for his account and risk, and furnished them to him. These accounts were the same as those furnished them by plaintiff with the exception that defendant was only charged with half as much commission on each transaction, so that his loss was that much less than their loss, as shown by plaintiff's statements to them. There was also evidence tending to prove that defendant afterward proposed to arbitrate with plaintiff the question whether the deliveries of the oats were regular, under the rules of the board of trade, and said that he would pay the loss if they were found regular.

On the other hand, the defendant and the surviving member of the firm of H. S. Carpenter & Co., denied that the firm acted in any sense as agents of defendant. The evidence for defendant was that H. S. Carpenter & Co. bought the oats on their own account, and sold them to defendant at the prices paid on the board of trade and the charges; that the letter or name put on accounts of purchases and sales sent them by plaintiff, indicated that they had a con-

tract with defendant and were protecting themselves by the purchase at Chicago; that the proposed arbitration was between them and plaintiff, and was for the purpose of settling a claim of defendant against them; that the deliveries were not regular so as to relieve them, because if defendant had a claim against them they had the same claim against plaintiff.

The statements and accounts in their form indicated an agency of H. S. Carpenter & Co., as commission merchants for defendant. They charged him with commissions, storage, insurance and interest, and credited him with the entire proceeds when sold. Regarded as an agency, it was rather a singular one, as they only charged him with one-half of the commission, and had to allow that to plaintiff, and lost their expenses and their half of commissions, doing the business for nothing and at their own expense; but it would be equally remarkable that they should buy oats and sell them to him on that basis. No doubt H. S. Carpenter & Co. understood that they were to be treated by plaintiff as principals, and so regarded themselves in all their dealings with him; but, however they or the defendant may have regarded the relations of the parties, or whatever name they might give them, it appears that the firm was in fact acting for defendant in buying the oats.

In the arrangement between plaintiff and H. S. Carpenter & Co., and in the course of their dealings, it was understood that the firm were not only dealing on their own account, but that in some way they were doing business for other persons. So far as these oats were concerned, it was not known by plaintiff, up to July 31, 1891, in what capacity they had been ordered by H. S. Carpenter & Co., but on that day he learned that defendant claimed that the deal was his, and that H. S. Carpenter & Co. delivered the oats through plaintiff. After receiving the oats on that day, plaintiff sent the notice before mentioned to H. S. Carpenter & Co. that the oats had been taken in, paid for and insured on their account. Afterward, when arbitration was proposed, for the settlement of the question whether plaintiff was en-

titled to payment of the loss on account of alleged non-delivery, plaintiff refused to recognize defendant in the transaction, writing and telegraphing H. S. Carpenter & Co. that he would arbitrate with them, but not defendant; that he had no trade with defendant and never did have, and that the trade was with them. So far as plaintiff was concerned, the defendant was not recognized in the attempted arbitration. All the facts, and the names and credit of the parties were before plaintiff, and we think that his refusal to recognize defendant as interested in his claim, and his insistence that the trade was with H. S. Carpenter & Co. alone, and not with defendant, justified a finding that he elected to give exclusive credit to that firm. Such an election, with full knowledge, would relieve the defendant from liability. Story on Agency, Sec. 447.

Defendant paid H. S. Carpenter & Co. for the oats. He kept margins with them to the market value. He had between five thousand and six thousand dollars in their hands, August 1, 1891. He paid them \$1,500 on that day, and had ample funds with them to cover losses. That firm had \$13,053.02 in plaintiff's hands to protect their various trades at the close of business July 31st, and from that time to August 20th, when the last oats were sold, they paid him \$4,000. Their deposit was reduced by charges so that on August 20th there was a balance of \$176.52 due plaintiff without crediting them with one half of the commission to which they were entitled, and which would balance the account. Plaintiff's attempt was to give defendant no credit for moneys sent by H. S. Carpenter & Co., although he had funds in their hands for that purpose, but to credit such moneys upon other trades in rye and corn, afterward closed at a loss, and hold defendant responsible for this loss. If plaintiff should recover according to his claim he would owe H. S. Carpenter & Co. a balance. If defendant could be held liable for the contract of his agents, we are unable to see why he should not have the benefit of payments made by them, and in that event there would be nothing due from him. But we think that he was not liable on the ground

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that plaintiff, with full knowledge of the facts, elected to give exclusive credit to H. S. Carpenter & Co. There are some questions raised about the instructions, but we do not regard them as important or requiring special comment. The judgment will be affirmed.

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George I. Whitney v. Philip R. Bohlen and R. C. Graves.

1. APPELLATE COURT PRACTICE—*Second Appeals upon Determined Questions.*—When, on appeal from an order overruling a motion to vacate a judgment, the action of the lower court is reversed, and the cause, upon being remanded, is reinstated in that court, and the motion sustained, such action will be affirmed upon a second appeal, if no other questions are involved.

Memorandum.—Appeal from the Circuit Court of Putnam County; the Hon. THOMAS M. SHAW, Judge, presiding. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 13, 1894.

FRED T. BEERS, attorney for appellant.

OTIS & GRAVES, attorneys for appellees.

MR. JUSTICE CARTWRIGHT DELIVERED THE OPINION OF THE COURT.

This case was here on a former appeal, and is reported as *Graves, Ex'r, v. Whitney*, 49 Ill. App. 435. At that time the order of the Circuit Court overruling the motion of the present appellee to vacate a judgment entered by confession in vacation, was reversed and the cause remanded to that court. The cause was duly reinstated in said court and said motion was sustained and the judgment vacated in accordance with the decision of this court.

All the questions involved in this appeal, or raised by appellant in his brief, were passed upon by this court in the former appeal, and the judgment, which accords with the conclusions then reached, will be affirmed.

Thomas Cook v. Ross Watts.

1. VERDICTS—*Not to be Set Aside When, etc.*—A new trial will not be granted on the ground that the verdict is against the weight of evidence unless the verdict is manifestly wrong; where the evidence is conflicting it is for the jury to weigh it and decide according to the balance.

Memorandum.—Replevin. Error to the Circuit Court of Iroquois County; the Hon. ALFRED SAMPLE, Judge, presiding. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 13, 1894.

CHARLES W. RAYMOND, attorney for appellant.

J. H. DYER, attorney for appellee.

MR. JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

For the year 1891, appellee, by verbal contract, rented of appellant, the owner of a farm of 160 acres, the dwelling house situated thereon, forty-five acres in the northwest part of the farm and thirty-five acres in the southwest part, to be cultivated in corn, and twenty-three acres in the southeast part to be cultivated in oats. Between the forty-five acre tract and the twenty-three acre tract is a meadow patch of seven acres. When the grass on the meadow was ready for harvest, appellee cut and cared for it and delivered to appellant one-half of it in the stack. Appellee continued as tenant for the year 1892, under the same verbal agreement as obtained for the year 1891, except that he was not to have the twenty-three acre tract.

After the agreement for the letting for the year 1892 was made, appellee hauled and distributed upon the meadow about seventeen loads of manure, and when the grass was ready to cut, made his arrangements to cut it; but appellant, during the temporary absence of appellee from home, had it cut, and against the protest of appellee had it cared for and stacked upon the farm.

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When appellee's term expired and he moved from the farm, he undertook to take one-half of the hay, and did take two or three tons, when this replevin suit was commenced by appellant before a justice of the peace.

Appellant was defeated before the justice and also on appeal in the Circuit Court.

The sole question is whether the seven acres of meadow was included in the letting. Appellee swears it was not, and is corroborated by three other witnesses, one of whom was present when the contract was made. No error was committed upon the trial and none in giving or refusing instruction. One instruction was given for appellee, nine were given for appellant, and five offered by him refused.

Appellant had a fair trial. To decide the single disputed question of fact was within the peculiar provision of the jury, and we do not feel warranted in disturbing their finding. Judgment affirmed.

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Duncan McPhail v. The People ex rel. Chas. T. Lambert.

1. **POLICE MAGISTRATE—*Nature of the Office.***—The office of police magistrate is not, strictly speaking, a municipal office. It is an office having the same jurisdiction as a justice of the peace, and is one in which the general public has an interest in having filled in a legal manner, and in prohibiting an excess of such magistrates and their multiplication, in violation of law.

2. **SAME—*Election Since the Constitution of 1870.***—Section 21 of Article 6 of the Constitution of 1870, provides for the election of police magistrates and justices of the peace. Any other mode of filling the office is unconstitutional.

3. **QUO WARRANTO—*Proper Remedy—Police Magistrate.***—A writ of quo warranto is the proper remedy to test the right of a person to hold the office of police magistrate.

4. **SAME—*Limitations.***—In the absence of statutory limitations it is held in this country, an information in the nature of a quo warranto in behalf of the people, may be filed at any time.

5. **PLEADINGS—*Vacancies in Office.***—In pleading to an information

in the nature of a quo warranto to test the right of a police magistrate, that there was a vacancy in the office, etc., the recitation "there being a vacancy in the office," etc., is not sufficient. There should be a direct averment of a vacancy and a showing by facts stated, the manner of its occurring.

6. *SAME*—*Not Estopped by Recognizing the Defendant in the Office.*—The fact that the relator has recognized the defendant in a quo warranto proceeding as holding the office his right to which the proceeding is brought to test, is no defense to the action, as it does not estop the relator from proceeding therein.

Memorandum.—Quo warranto proceedings. In the Circuit Court of Peoria County; the Hon. THOMAS M. SHAW, Judge, presiding. Trial and judgment of ouster; appeal by defendant. Heard in this court at the May term, 1894, and affirmed.

H. W. WELLS, attorney for appellant.

R. J. COONEY, State's Attorney, for appellees; L. F. MEEK, of counsel.

MR. PRESIDING JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

The state's attorney of Peoria county, at the relation of Chas. T. Lambert, filed an information returnable to the October term, 1893, of the Circuit Court. It appears from the relation that Chas. T. Lambert was duly elected police magistrate in the city of Peoria under their existing laws, November 4, 1890, for the term of four years, and was duly qualified and entered on the duties of his office; that his term of office commenced to run from the first Tuesday in January, 1891, and that he had ever since continued to fill the duties of his office and that his term expired first Tuesday of January, 1895.

The relation further showed that the city of Peoria, by vote of its legally qualified voters became organized under the general corporation act, entitled "An act to provide for the incorporation of cities and villages," approved April 10, 1872, November 6, 1891; that prior to that time the city had been organized under an act entitled "An act to reduce the charter of the city of Peoria and the several acts amenda-

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tory thereto into one act and revise the same," approved February 20, 1869. The relation further shows that under the general incorporation laws for cities and villages, under which the city of Peoria is now organized, there is no provision for the election of police magistrates in any city organized under it; that the only act authorizing the election of such offices in incorporated cities is the act approved April 13, 1875, Laws 1875, p. 91, all former acts having been repealed. 1874, R. S., p. 1012, 1021. Sec. 1 of the act of 1875 provides for the election of police magistrates, and Sec. 2 provides that election of police magistrates shall not be held in cities having one or more police magistrates elected under a former organization as a town or city, until the term for which said police magistrate was elected has expired. If the last named act is not applicable the relator's election took place under the charter of 1869. It appears by a showing of the relation that the term of office for which said relator was elected did not expire until the first Tuesday in January, 1895, and that contrary to law, and when no vacancy existed, the appellant was voted for for police magistrate and elected to the office at a municipal election specially called by the city council for the election of city officers under the general law, April 19, 1891, and that appellant assumed to qualify as such and assumed to act as police magistrate of the city and continued so to act, when his election, by act of April 13, 1875, was expressly prohibited. And the relator gave the court to understand that said Duncan McPhail then continued to hold said office without warranty or right, to the damage and prejudice of the people of the State of Illinois, and against the peace and dignity of the same.

A writ of quo warranto was duly issued and served and on the case being called the appellant by his attorney pleaded several pleas, Nos. 1, 2, 3, 4, 5, 6 and 7, to which said several pleas the state's attorney entered a general and special demurrer, which demurrer was sustained by the court, and appellant abiding his said pleas the court entered a judgment of ouster against said appellant and assessed a fine of one

dollar and costs against him, from which said judgment this appeal is taken.

The question arises here as to the sufficiency of the several pleas. The first and second pleas set up the statute of limitations of one year in the first and of sixteen months in the second plea. It is insisted that the statute of limitations should apply as it is enacted in England by act of 1882, limiting the time to calling in question by quo warranto proceedings the holding of a corporate office to twelve months. It is not claimed that this act of the English Parliament has any force in this State, but it is insisted that as matter of public policy the court should exercise its discretion to refuse the writ after such time has elapsed, and that such statute ought to have weight in determining the question of the time when the writ should be refused. We do not think the point well taken. The office of police magistrate is not, strictly speaking, a corporate office. It is an office having the same jurisdiction as other justices of the peace, and is one in which the general public has an interest.

It is certainly an office in which the general public has great interest, and in having it filled in a legal manner, and in prohibiting an excess of public magistrates and their multiplication where there is no law authorizing it, and there is no equitable reason in this case why the writ of quo warranto should be withheld.

In the absence of statutory limitations it is held in this country the attorney-general may file the information in behalf of the people at any time. High on Extraordinary Legal Remedies, Sec. 621, p. 451.

The third plea undertakes to set up that the office of police magistrate in the city of Peoria was vacant, and that in consequence appellant was legally and properly elected to fill the office. There is no direct averment that the office was vacant, only by recitation. "There being a vacancy in the office of police magistrate," is the form of the averment. This is not sufficient. There should be a direct averment of vacancy and a showing by facts stated

of the manner of its occurring. There is this attempt to show how it occurred, to wit: "and the defendant avers that the city of Peoria, aforesaid, has wholly failed and neglected to elect any police magistrate under any law at any time prior to the last mentioned law, and said failure to elect as aforesaid was the cause of the aforementioned vacancy," etc. It is not shown that there was no election held by the city of Peoria on the fourth day of November, 1890, under the charter of the city then in force, at which the relator was elected police magistrate of said city, or that he was not legally qualified and assumed the duties of the office; although it was so averred in the information and it is admitted in appellant's argument that the allegation in that particular was truthful. The appellant claims that the charter of 1869 did not authorize the election of a police magistrate, but his appointment by the city council, and cites Sec. 5 of such charter. But Sec. 21 of Article 6 of the Constitution of 1870, provides for the election of police magistrates and justices of the peace; here any other mode of election would be unconstitutional.

The plea was a mere evasion, and not specific and full enough to require a replication. Besides, the plea fails to show appellant had the necessary statutory qualifications for the office, either as citizen of the United States or resident of Peoria, or that he had qualified as the law required. The plea, we think, as well as Nos. 1 and 2, was bad, and the demurrer properly sustained thereto.

The fourth, fifth and sixth pleas attempt to set up an estoppel against the relator on the ground that he promised appellant his support and political influence in the election, although it is not averred that any assistance was rendered in the election.

There is no ground of estoppel in this. Such a promise would be contrary to public policy and void. And again, no assistance was rendered, and appellant and relator were not running for the same office, as relator is claiming under a former election.

The seventh plea avers an estoppel in that the relator in

exercising the functions of his office of police magistrate sent twenty-five cases to him as police magistrate, thus recognizing him as duly and legally holding the office.

This is entirely insufficient to work an estoppel. In no event could such acts work an estoppel, as appellant was police magistrate *de facto*, and such an act as sending him cases on a change of venue would not be regarded as working an estoppel. In any event, the question involved is not so much personal to the relator as it is of general interest to the public, and hence the prosecution would not be barred by acts of individuals, especially when claiming no right under the same election.

We are of the opinion that the demurrer to the several pleas was rightfully sustained, and the judgment of ouster proper. The judgment is therefore affirmed.

City of La Salle v. Thomas Wright.

1. **EXCESSIVE DAMAGES**—When \$1,200 is.—\$1,200 for the loss of about six weeks' time, and a slight deformity in or depression of the ribs where broken, is excessive.

2. **ORDINARY CARE**—*Necessary to a Recovery*.—When the evidence shows that the plaintiff, in an action for personal injuries, was not at the time in the exercise of ordinary care for his safety, the verdict in his favor will be set aside.

Memorandum.—Action for personal injuries. In the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding. Declaration in case: plea, not guilty; trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1894. Reversed and remanded. Opinion filed December 13, 1894.

THOMAS N. HASKINS and VINCENT J. DUNCAN, attorneys
for appellant.

BREWER & STRAWN, attorneys for appellee.

MR. PRESIDING JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This was an action on the case by appellee against appellant, a municipal corporation, having charge of the streets inside the corporation, and in law bound to use reasonable care to maintain them in a good, safe condition for travel.

The declaration charges the appellant with negligence in failing to maintain a certain portion of one of its streets in a safe condition for travel, to wit, that portion of it where it crosses the Chicago, Rock Island & Pacific Railroad tracks, being an overhead crossing by means of a viaduct.

The charge of negligence consists in the fact as charged, that appellant maintained an earth embankment approaching the viaduct across said track from the south about 150 feet long, rising as it approached the bridge to a height of twenty feet, and being at the bridge about fifteen to twenty feet, or, as some of the evidence shows, thirty-six feet wide, and that it negligently failed to build a wall, fence, railing or protection along the sides of said embankment, and that its slopes were as steep as the dirt would lie; that it was the only way of reaching the business part of the city from south of the Illinois river without making a long detour of half a mile or more to the west, where the railroad was crossed at grade. The declaration charges negligence on the part of appellant in maintaining such a dangerous street in such a locality. It charges that while the appellee was being driven by a driver in a spring wagon with a horse attached over this embankment approaching the bridge, and while in the exercise of care, the horse became frightened at a passing train under the said bridge and backed the wagon, containing appellee, off the embankment, by means whereof appellee was thrown out and fell to the bottom of the embankment and seriously bruised and injured him, and his ribs were broken, by reason of which he suffered pain and was confined to his bed and kept from his employment of coal mining for six weeks, and was permanently disabled, by means of which he suffered \$5,000 damages, etc.

The appellee entered plea of not guilty, and the case was

submitted to a jury for trial, which, after hearing the evidence, rendered a verdict of guilty against appellant and assessed appellee's damages at \$2,000, but on motion for a new trial, made by appellant, appellee's attorneys remitted \$800 of the verdict, and the court overruled the motion for a new trial and rendered judgment against appellant for \$1,200 and costs.

From this judgment this appeal is taken and reversal asked on two grounds only: First, the verdict was manifestly against the weight of the evidence; second, the verdict, even after the remittitur, was excessive.

There is no complaint of any action of the court, either as to its rulings on admission of evidence or in its instructions. The only action of the court complained of is in not granting appellant a new trial on the ground of want of sufficient evidence to sustain the verdict, in not finding appellee guilty of the contributory negligence charged, and as to the measure of damages.

The main facts in relation to the circumstances of the accident and resulting injury are, that on the day of the accident, a rock had fallen in the coal mine where appellee and others were at work, and badly injured a fellow-workman of appellee.

Thomas Cook and the appellee were directed to take the man home with a horse and spring wagon belonging to the mining company.

The evidence tended to show that the horse was a large, gentle animal and was intrusted to Cook to drive. Appellee and Cook sat on the front seat and Thomas Powell, the injured miner, and his son, behind. Cook and Powell were on the right side of the wagon and appellee and the injured man's son on the left side with the injured man between them. They drove slowly along the embankment approaching the railroad bridge which they were aiming to cross, and just as the horse stepped on the viaduct a passenger train shot from behind Byrne's elevator, situated along the railroad track, and ran under the viaduct, at the same time whistling and throwing up a cloud of steam and smoke in front of the horse. The horse reared up, as claimed by

appellee, and backed, and appellee with his hands grasped the reins in front of Cook; the wagon cramped to the west and went over the bank with the horse about twenty-five or thirty feet south of the bridge. As the wagon went over, Cook and Powell, being on the east side, saved themselves by jumping; but the others went over with the wagon. The appellee had two ribs broken and called a physician, who bandaged up his broken ribs. He was wholly disabled from following his occupation as a coal miner for about six weeks, and felt the effects of it for six months, and sometimes up to time of trial, as he testified, he felt it yet when he worked hard. There does not appear to be any permanent injury, unless a depression where the ribs were broken causing slight deformity, is permanent. There was nothing to obstruct the view of the Rock Island railroad track from the road on which appellee was approaching the bridge for a long distance, until after appellee reached within sixty feet of the bridge; then the view was obstructed by Byrne's warehouse. Any time before that for a considerable distance appellee could have seen an approaching train for at least one-half mile. He did not, nor did Cook, who was driving, look for the approaching train, for the reason they did not think of it. Therefore appellant contends that appellee failed to exercise ordinary care in not looking for the approaching train while approaching the railroad bridge, and that he caused the horse to back over the embankment by grabbing and pulling on the lines and pulling the horse back. The appellee appeared to be badly frightened when he grabbed the lines but denies that he pulled the horse back and asserts the horse reared up on his hind feet before he took hold of the lines.

The contention of appellant that appellee caused the horse to back by pulling on the lines is supported by the evidence of Mr. Byrne, who stood in the middle of the bridge, and by Mrs. Anne Simpson, who was sixty or eighty feet north, who testified appellee pulled the lines very hard and backed the wagon off the embankment.

It is contended that admitting all that the evidence tends to prove, the verdict ought to be set aside, and even that if

the verdict could be sustained, the injury was so slight that the sum of \$1,200 would be excessive. It is not contended that evidence does not justify the jury in finding that the appellant was not in the exercise of ordinary care, in not having some kind of a guard along each side of the high embankment to prevent teams from running off, and to prevent such accidents as this.

We have examined the evidence and think the above a fair statement of the principal facts as shown by the abstract. We are of the opinion that the jury were not justified in finding the appellee free from contributory negligence. The evidence clearly preponderates in favor of appellant's claim, that appellee himself backed the horse off the embankment, and but for such act on his part, the horse would not have backed off, as he did, and the accident not have happened. Appellee failed to hear or refused to obey the calls of Byrne, who was close by, to "not pull on the lines." Although he may have been frightened, we think no reasonable man under the circumstances would have acted as reckless a part as he, in pulling the lines. Then there was no care at all shown in approaching this crossing to discover the approach of the train, though this might not alone be sufficient to reverse, if there was no other error, as this was not a grade crossing.

We also think the damages of \$1,200 for the loss of about six weeks' work and the slight injury received by appellee is excessive, and the jury was regardless of appellant's rights in the premises in awarding \$2,000. For the manifest disregard by the jury of the evidence in the case, the judgment will be reversed and the cause remanded.

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Benj. L. T. Bourland and James Deal v. The Springdale Cemetery Association and Hervey Lightner.

1. CEMETERIES—*Rights of Lot Owners to an Inspection of the Books.*
—Lot owners in the Springdale Cemetery Association of Peoria, have no right to an inspection of the books and to have an account taken of the

Bourland v. Springdale Cemetery Ass'n.

proceeds and expenditures of the association, so long as the directors discharge their duties under the charter as to keeping up the cemetery.

2. *SAME—Rights of Lot Owners in Case of Neglect.*—On a proper showing in a court of equity of neglect upon the part of the Springdale Cemetery Association, the lot owners are entitled to a decree requiring the directors to set apart, and use for that purpose, such a fund as will be necessary to keep in good repair and condition such portion of the cemetery grounds as they have control of; walks, avenues, fences, etc.

Memorandum.—Proceedings in equity. In the Circuit Court of Peoria County; the Hon. THOMAS M. SHAW, Judge, presiding. Hearing on demurrer and bill dismissed; appeal by complainants. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 13, 1894.

APPELLANTS' BRIEF, H. W. WELLS, ATTORNEY.

A trustee must not deal with the trust property for his own benefit. *Roseboom v. Whittaker*, 32 Ill. 88; *Dwight v. Blackman*, 2 Mich. 330; *Ellis v. Ward*, 137 Ill. 509; *Sheldon v. Rock*, 30 Mich. 296; *Terwilliger v. Brown*, 44 N. Y. 237; *Stickney v. Goudy*, 132 Ill. 228; *Catton v. Field*, 28 Ill. App. 363.

The remedy for a breach of trust is the removal of the trustee and the appointment of a new trustee, not a setting aside the trust. *Brower v. Callender*, 105 Ill. 88.

The protection of trust property and the enforcement of the duties of a trustee is a favorite branch of equity jurisdiction. *Natl. Bank v. Halle*, 30 Ill. App. 22.

Equity has jurisdiction in any case which charges a violation of duty by a trustee, and seeks to enforce the performance of that duty. *Sherman v. Leman*, 137 Ill. 98.

Where the trustee appropriates the trust fund, fraud is presumed, and equity will set aside the fraudulent act and remove the trustee. *Tolwe v. Ambs*, 123 Ill. 414; *Lehman v. Rothbarth*, 111 Ill. 185.

A court of equity always has jurisdiction of any misappropriation or malfeasance of a trust. It will search the conscience of the trustee. It will enforce a trust, or it will remove a trustee and appoint another. *Coats v. Woodworth*, 13 Ill. 654; *Brower v. Callender*, 105 Ill. 88; *Board, etc., v. Blakewell*, 122 Ill. 340.

In case of waste or perversion of trust property on account of inability or indisposition of the trustee to execute the trust, equity may seize the property or fund and place it in the hands of another trustee who will execute the trust. *Ward v. Farwell*, 97 Ill. 593.

APPELLEES' BRIEF, JACK & TICHENOR, ATTORNEYS.

In order to maintain his bill or compel discovery, the complainant must clearly show that he has a direct, personal interest in the subject-matter, and a proper title to institute a suit concerning it. *Story on Eq. Juris.*, 503-519.

MR. JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

The Circuit Court sustained a demurrer to a bill in chancery, filed by appellants and Frank T. Corning, charging that the Springdale Cemetery Association was incorporated in 1855 by the legislature; that it accepted the trusts in the charter granted and began to do business; that it purchased the N. E. $\frac{1}{4}$, Sec. 34, T. 9 N., R. 8 E., Peoria county, Illinois, and other lands now occupied by it as a cemetery; that it paid \$3,000 only for the above described land, although the deed recites a consideration of \$10,380; that while the deeds to the association are in form in fee simple, it holds as trustee for the purpose of a cemetery; that its charter provided that expense of grading roads, making walks, fencing, etc., should be paid out of the proceeds of lots sold; that large sums of money had been collected from lot owners for work done by way of improving the grounds and large sums, aggregating between \$100,000 and \$200,000 had been realized by the association from sales of lots; that one Harvey Lightner and other directors, to the complainants unknown, have entire management of the cemetery, but keep all their doings secret; that said Lightner and the unknown directors have repudiated the charter; that they claim to be the owners of the cemetery and proclaim their intention to set apart part of the income of the cemetery for the care of the grounds,

Bourland v. Springdale Cemetery Ass'n.

and divide the balance among the members of the association for their private use; that they have already apportioned in that way much money as dividends, and that the affairs of the association have been grossly mismanaged by Lightner and others.

The bill shows that the complainants are interested as lot owners and prays that the directors may render an account to the court; that they be removed for gross malfeasance and that the court order an election by the lot owners for trustees to manage the association, or if the court shall decline to order such election that the court will appoint a receiver and direct the association to turn over the books of account to him and that the court will decree a specific performance of the trust imposed by charter.

The complainants stood by their bill and it was dismissed. The Circuit Court properly sustained a demurrer to the bill.

The bill nowhere charges that the association has failed to keep the grounds in good repair and in good order as provided by the charter. No omission of duty either in keeping up the fences, in keeping the walks and avenues free from weeds and rubbish, or in keeping public vaults and receptacles in repair is charged. The only charge of neglect is that certain lots which have been sold have, by the owners, been allowed to grow up in weeds and become otherwise unsightly. No duty is imposed upon the association by charter to lay out money in keeping up these lots. Section 6 of the charter provides for the execution of deeds conveying in fee title to the purchasers of lots. Section 8 provides for the alienation of lots at will. The bill charges that large sums of money have been collected from lot owners for work done on lots, but that depends upon the contract with owners. Some lot owners doubtless prefer to have the association look after the improvement and beautifying of their lots. Others prefer to do that themselves. But if some owners neglect to improve and keep in rightful condition their lots, we are unable to discover any right in other lot owners to compel the association to do so. In our opinion appellants as complainants seeking relief in a court

of equity are entitled to no further decree than, on a proper showing of neglect upon the part of the association, to require the directors to set apart and use for that purpose such a fund as will be necessary to keep in good repair and condition such portion of the cemetery grounds as they have control of—walks, avenues, fences, etc.

Appellants have no right to an inspection of the books and to have an account taken of the proceeds and expenditures of the association, so long as the directors discharge their duties under the charter as to keeping up the cemetery. Decree affirmed.

56	302
110	*587

**Gray Brothers v. Joseph Knittle, Doing Business as
Excelsior Show Case and Cabinet Works.**

1. **VERDICTS—*Upon Conflicting Evidence, Conclusive.***—The court will not disturb the verdict of a jury in a conflicting state of the evidence in the absence of errors of law affecting the result unfavorably to an appellant.

2. **INSTRUCTIONS—*Erroneous, Not Always Reversible Error.***—When it is apparent from the verdict that an erroneous instruction has not influenced the jury, the giving of it is not reversible error.

3. **BUILDING CONTRACT—*Acceptance of Work—Latent Defects.***—Where a building, completed under a contract and in apparent compliance with the terms of the contract is accepted by the owner, and afterward defects appear which did not appear at the time of the acceptance, the owner is not barred of his remedy and claim for damages by reason of his acceptance of the building.

Memorandum.—Assumpsit. In the Circuit Court of Knox County; the Hon. ARTHUR A. SMITH, Judge, presiding. Declaration on contract, etc.; plea, general issue, set-off and payment; trial by jury; verdict for plaintiff; appeal by defendant. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 13, 1894.

APPELLANTS' BRIEF, THOMPSON & SHUMWAY, ATTORNEYS.

Where a party, under contract to sell and deliver, neglects to deliver at the time named, and the party accepts sale, he

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is entitled to set-off damages resulting from failure to comply with the contract. *Havana, Rantoul & E. R. R. v. Walsh*, 85 Ill. 58; *Haven v. Wakefield*, 39 Ill. 509; *Priestly v. N. I. & C. R. R.*, 26 Ill. 205; *Mears v. Nichols*, 41 Ill. 207; *Tobey v. Price*, 75 Ill. 645; *Ramsey v. Tully*, 12 Brad. 463; *Chitty on Contracts*, 652 (11th Ed.); 2 *Benjamin on Sales*, Sec. 1356 (4th Am. Ed.).

PRINCE & WELSH, attorneys for appellee.

MR. JUSTICE CARTWRIGHT DELIVERED THE OPINION OF THE COURT.

Appellee, doing business as the Excelsior Show Case and Cabinet Works, on August 22, 1892, by written contract agreed to build and set up in the store building of appellants, in Galesburg, which they intended to occupy as a shoe store, shelving and office fixtures specified in the contract to be used in that business. The shelving and counter fixtures were to fill the two sides of the store from floor to ceiling, one side being 45 feet long and the other 57 feet, and were to be made in sections from 9 to 9½ feet long. The lower part was to be 30 inches high and about 32½ inches wide, and above this was to be shelving about 14½ inches deep, with two vertical supports in each section about 35 inches apart. The shelving was to be divided into boxes about 4x5 inches, with drawer fronts, each intended for one pair of shoes, there being about 7,000 of these boxes in all. The whole was to be made of quartered oak, and to be in position on or about September 20, 1892. The contract price was \$1,350.

The work of putting the shelving and fixtures in the store room was begun October 24, 1892, and was not completed until November 18th following. Appellee furnished extras to the amount of \$149.30, making a total of contract price and extras of \$1,499.30, of which appellants paid all but \$370, and appellee brought this suit for that balance. On the trial appellants claimed damages on account of the delay in completing the work and on account of the shelv-

ing sagging, which, it was alleged, was due to imperfect workmanship. The jury deducted from appellee's claim \$100 and returned a verdict for \$270. On a motion for a new trial the court required a further deduction by remittitur of \$16.25 and entered judgment for \$253.75 and costs.

The judgment is objected to as being against the evidence on the question of damages claimed by appellants, and on the ground that the court erred in instructing the jury on that subject. Appellants were in the shoe business in another store which they were to vacate January 1, 1893, and had an option to buy a lease of the store where the shelving was put for \$1,500, to commence September 1, 1892 or \$1,000 to commence December 20, 1892. The rental was \$55 per month, and they paid the \$1,500 for the lease and took possession September 1st. They paid the rent at \$55 per month and their claim is that by appellee's delay from September 20th, when the work was to be done, until November 18th, when it was completed, they lost not only the amount of rent paid for one month and twenty-eight days at \$55 per month, but also a proportionate share of the additional \$500 paid to get possession September 1st, rather than December 20th. Appellee contends that appellants were not prepared to occupy the building for business for the reason that an addition was being built at the rear and a plate glass front being put in, and that the furnace was not in, and therefore they suffered no damage. There was evidence for appellants that none of these things would have interfered with business if the shelving and fixtures had been in.

The evidence as to damages claimed to have been suffered on account of imperfect work was that the shelving was level and appeared to be all right when finished; that the boxes were filled with shoes, and that in from 30 to 60 days after the work was completed there was a perceptible sagging in the centers of most of the sections. The sag varied $\frac{1}{8}$ to $\frac{3}{8}$ of an inch, and while it did not materially impair the usefulness of the boxes and shelving, it injured their appearance. The evidence for appellants was that the feet

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of the supports between the ends of the sections were cut off by the workmen who put them up, and the sections were left without supports except at the ends, and it is claimed that this caused the settling in the centers. Witnesses for appellee denied that the feet of the supports were cut off, and the evidence on that side was that the building was about twenty-five years old and the floor very uneven; that the supports were fitted to the floor by compass and were planed off or blocked up as was found necessary to fit the irregular surface of the floor. It is claimed for appellee that the sagging was not due to any fault on his part, but to the condition of the floor and the great weight of the stock and fixtures, amounting to 18,800 pounds on one side and from 15,000 to 16,000 pounds on the other. There was a base-board which prevented an examination at the time of the trial, so that there was no conclusive evidence which witnesses were correct as to fitting the intermediate supports to the floor, at least as to the claim that they were or were not blocked up.

The jury allowed \$100 as damages under one or the other of the claims of appellants. It could not have been for the sagging, because the evidence for appellee was that it would cost \$116.25 to level up the fixtures, while appellants contended that it would cost much more. It is probable that the jury intended to allow the rent of the premises during the delay from on or about September 20th, when the work should have been completed, and by allowing some latitude under that provision the verdict could be accounted for. It is plain that the court, on the motion for a new trial, held appellants entitled to damage for imperfect work but not for delay, as a remittitur of \$16.25 was required, making the damages \$116.25, the amount requisite to level up the work. Whatever the allowance made by the jury may have been for, we are not disposed to disturb their conclusion in the conflicting state of the evidence, and in the absence of errors of law affecting the result unfavorably to appellants.

The court instructed the jury at the instance of appellee

that if appellants accepted the work as in accordance with the contract and found no fault with the same, then in that case their verdict should be for appellee for such an amount as under the proof they should find due him, and modified an instruction asked by appellants so as to harmonize with the one so given for appellee. The sagging did not appear when the work was accepted or for some time after, and appellants were not barred of their claim for damages from that cause or on account of the delay by reason of anything they did. The instruction should not have been given, but the jury paid no attention to it, for they allowed damages, and the court did not follow it, but required a remittitur to satisfy additional damage not compensated by the jury.

The errors in instructing the jury did not, therefore, influence the result, and the judgment will be affirmed.

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156* 310

John T. Milling, for the use of W. W. Taylor, Sheriff, etc., v. Andrew Hillenbrand et al.

1. **FRAUDULENT CONVEYANCES—*Merchants in Failing Circumstances.***—A merchant in failing circumstances may sell, and by a bill of sale convey to a creditor his stock of merchandise, and if done in good faith and for a valuable consideration, it will be upheld in law.

2. **SAME—*Change of Possession.***—Where a merchant in failing circumstances made a bill of sale of his stock of merchandise to one of his creditors, the creditor took possession and retained the keys of the building, spent a good part of his time in the store looking after the business and replenished the stock, retained the merchant in his employ as a clerk at a monthly salary, who remained in the store in that capacity, held that the change of possession was sufficient.

3. **EVIDENCE—*Statements of a Grantor.***—The statements of a grantor in a bill of sale of a stock of merchandise, is not admissible for the purpose of defeating the title of his grantee.

Memorandum.—Action of debt. In the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding. Declaration on a replevin bond: trial by jury; verdict for plaintiff for nominal damages; appeal. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 13, 1894.

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RECTOR C. HITT and A. T. LARDIN, attorneys for appellant.

J. T. MURDOCK and McDougall & Chapman, attorneys for appellees.

MR. JUSTICE CARTWRIGHT DELIVERED THE OPINION OF THE COURT.

This is a suit by appellant, John T. Milling, coroner of La Salle county, for the use of William W. Taylor, sheriff of said county, on a replevin bond given by appellees to said coroner in a suit instituted by appellee, Andrew Hillenbrand, for the possession of a stock of goods in Streator, which had been levied on by the sheriff under a writ of attachment against the property of one George Gordon. The replevin suit was not prosecuted, but was dismissed without a trial, and the goods replevied were ordered returned to the sheriff. The defendants in this suit on the replevin bond defended as against all but nominal damages on the ground that Hillenbrand, the plaintiff in the replevin suit, was the owner of the goods. They were successful in this defense and the plaintiff recovered nominal damages only.

George Gordon owned the stock of goods in question, and on April 25, 1892, was engaged in business in a building owned by defendant Hillenbrand. He was indebted to a grocery firm in Chicago in the sum of \$580, and on that day a commercial traveler for the firm called on Hillenbrand at his meat market in a room adjoining the store and informed him of Gordon's financial condition, which was not good. Gordon was indebted to Hillenbrand to the amount of about \$1,000, for money loaned, rent, meat and a hay account. As a result of the conference, Hillenbrand and the commercial traveler went to the store and sought payment or security for their claims. Gordon paid \$200 on the grocery account and executed a bill of sale to Hillenbrand of the stock of goods for the consideration of \$1,500, which was made up of the indebtedness to Hillenbrand, a note which Hillenbrand then signed with Gordon for \$380 to the grocery firm for the balance of their claim, and which note

Hillenbrand assumed and paid, and the balance in money afterward paid to Gordon or on his order. The bill of sale was recorded and the keys were turned over to Hillenbrand who delivered them to the deputy sheriff when the writ of attachment was levied four days later on April 29, 1892.

It is contended on the part of appellant that the bill of sale was intended merely as a security to Hillenbrand, and not as an absolute sale, and that if the transaction could be regarded as a sale, there was no sufficient change of possession as against the attaching creditors.

We think that the evidence justified the conclusion of the jury on these questions. No doubt Hillenbrand at first sought security for his claim, but finding that he could not obtain it, he offered \$1,200 for the stock. Gordon thought it worth more, and it was estimated by the commercial traveler, who had sold Gordon most of his groceries and was familiar in a general way with it, at \$1,500, and finally Hillenbrand agreed to give \$1,500 for it. The consideration was adequate, and the sale appears to have been *bona fide*.

The evidence concerning a change of possession was that the keys were delivered to Hillenbrand and retained by him; that he took possession when he received the bill of sale; that he was in the store a good part of the time looking after the business, and that he replenished the stock. Gordon was a Hungarian and the customers were of that language which Hillenbrand could not speak. For that reason he employed Gordon at \$40 per month as clerk, and Gordon remained in the store in that capacity. It was obvious that Hillenbrand was in control of the business and premises.

It is complained that the court did not admit evidence of Gordon's declarations regarding the ownership of the goods made in the absence of Hillenbrand and without his knowledge after the execution of the bill of sale and surrender of possession.

It was not permissible to prove the statements of Gordon to defeat the title of his grantee. *Bennett v. Stout*, 98 Ill. 47.

The court, at the request of defendants, gave an in-

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struction purporting to state what would be a sufficient change of possession as between Gordon and Hillenbrand. There was no question of that sort before the jury, and they would probably suppose that the instruction was intended to explain the law on the issue before them as to whether there had been a sufficient change of possession as against creditors. As a statement of the law on the issue being tried, it was objectionable; but the jury were fully and accurately instructed at the instance of plaintiff on the subject, and we are satisfied that they were not misled as to the law. Substantial justice seems to have been done, and the judgment will be affirmed.

William Deering v. Samuel C. Wiley et al.

1. **PROMISSORY NOTES—*Diligence to Collect Waived by Indorsers, etc.***—Where a promissory note contains a provision that indorsers and guarantors waive notice of non-payment and diligence in bringing suit against the maker, the payee is not required to exercise that diligence which an ordinary indorser and guarantor have the right to insist upon in order to be entitled to a recovery against indorsers or guarantors upon the note,

2. **TRIALS—*Improper Remarks of the Judge.***—Upon the trial the judge took occasion to remark in the presence of the jury that the testimony of a witness, naming him, was contradictory. *Held*, improper and prejudicial to the opposite party, and its evil effect is not cured by the subsequent remark of the judge, "I think likely that the remark of the court that it is contradictory may be stricken out."

Memorandum.—*Assumpsit.* In the County Court of La Salle County; the Hon. B. F. LINCOLN, Judge, presiding; declaration on promissory note and guaranty; the pleas are stated in the opinion of the court: trial by jury; verdict and judgment for defendant; appeal by plaintiff. Heard in this court at the May term, 1894. Reversed and remanded. Opinion filed December 13, 1894.

D. B. SNOW and W. H. HINEBAUGH, attorneys for appellant.

RICHOLSON & SEELEY and H. C. WILEY, attorneys for appellees.

MR. JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

In February, 1883, appellant appointed O. L. Wilson & Co. his agents to sell farm machinery at Earlville, Illinois, and vicinity for the season of 1883, upon commission. By the written contract executed the agents agreed to sell to good and responsible men only, and to take all notes payable to appellant on blanks to be furnished by him. They agreed to indorse all notes taken by them as follows: "For value received, I hereby guarantee the payment of this note and hereby waive demand, protest and notice of non-payment thereof." It was further provided that the failure of the agents to indorse notes should not affect the above guaranty of all notes taken upon sales under the agreement. Appellant was to have entire control over all contract notes, etc., growing out of sales.

Pursuant to the contract, a harvesting machine was sold to one James Donough, and two notes for the sum of \$100 each, taken. The notes are payable to appellant and on the back of each is the printed form of guaranty of payment. The printed form is not signed but in its stead is the following indorsement: "We guarantee the collection of this note. O. J. Wilson & Co."

When appellant's general agent settled with the firm he objected to these two notes because of the indorsement, but one of the firm requested him to send them in to appellant, and that if appellant objected to them to send them back, and they would pay the money. In a few days they were returned with the objection that they were not properly indorsed and a request made for another indorsement. The firm refused to make any further indorsement and returned them claiming that appellant's agent had already accepted them.

The notes were subsequently sued upon and judgment rendered against Donough. Executions issued, but all attempts to collect were futile because of the insolvency of Donough. Then followed this suit. Wiley alone interposed a defense. The declaration contains the consolidated common counts and three special counts on the guaranty of

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collection indorsed on the notes. The special counts set up diligence in efforts to collect from the maker, judgment and return of execution *nulla bona*, insolvency of maker, etc. Wiley pleaded, 1st, the general issue; 2d, that the guaranty indorsed was not within the scope of the partnership; 3d, statute of limitations; 4th, payment; 5th, that no judgments were rendered against maker, etc.

Upon the trial, appellant claimed the right to recover upon the ground that by the commission contract, under which O. L. Wilson & Co. operated and took the notes in question, it was provided that the firm should guarantee payment. It is plain that such a claim could not obtain under the pleadings and amended bill of particulars filed.

The notes provided that indorsers and guarantors waived notice of non-payment and diligence in bringing suit against the maker. Appellant was not required to exercise the diligence which an ordinary indorser had the right to insist upon. The court in allowing proof of what the maker had when the notes matured and before suit was brought committed error, therefore.

In view of the proof introduced by appellant showing that the property held by the maker at the maturity of the notes was so heavily mortgaged as not to make it available, this error was, perhaps, not very harmful. But the error of the court in permitting it to be shown that the notes were renewed by an arrangement between William Wilson and Donough, and the new notes taken by William Wilson paid, we can readily see was very detrimental to appellant. There was no evidence whatever, tending to show that William Wilson or any other person had authority to extend time of payment or take a renewal of the notes.

The court took occasion to remark in the presence of the jury that the testimony of one Gilchrist, an important witness for appellant, was contradictory. This was improper and prejudicial to appellant. We can not say its evil effect upon the jury was cured by the subsequent remark of the court, "I think likely that the remark of the court, that it is contradictory, may be stricken out."

Several instructions were given for appellee, entirely ignoring that provision of the notes that guarantors waived diligence in bringing suit against the maker. Another instruction told the jury that it devolved upon the plaintiff to show, among other facts, by a preponderance of the evidence, that the officer who received the execution issuing from the judgment against John Donough, performed his duty with due diligence. The giving of these instructions was erroneous.

The judgment must be reversed and the cause remanded for another trial.

Dennis Owens v. Bridget Owens.

1. **DECREES**—*Facts Found by a Jury, When Final.*—Where an issue in chancery is tried by a jury, the facts established by the verdict appearing in the record and recited in the decree are final, unless the party against whom the verdict is rendered, moves in the court below to set it aside or for a new trial.

2. **ALIMONY**—*Subject to Subsequent Orders of Court.*—If the amount of alimony is too great, or the extent of the lien of the decree securing it, oppressive, application can be made to the court for a modification.

Memorandum.—Divorce and separate maintenance. In the Circuit Court of Stark County; the Hon. THOMAS M. SHAW, Judge, presiding. Decree for alimony, etc., on cross-bill; error by complainant. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 18, 1894.

J. A. McKENZIE, attorney for plaintiff in error.

M. SHALLENBERGER and A. P. MILLER, attorneys for defendant in error.

MR. PRESIDING JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

The plaintiff in error filed this bill in the Circuit Court of Stark County against the defendant in error for divorce.

The latter filed her petition for separate maintenance. By agreement both issues were tried by the same jury. The jury found in favor of the defendant in error on the issue raised by her petition, *i. e.*, that she was living separate and apart from her husband without any fault of her own at the time of the commencement of the suit, and was still so living, and found the issues on plaintiff in error's bill for divorce in her favor. The court, upon this verdict of the jury, gave defendant in error as alimony, \$300, a house and a small lot of ground, and recited the fact of the verdict in the decree, and dismissed plaintiff in error's bill for divorce.

The plaintiff in error brings up this record and asks reversal because there is no evidence preserved in the record to sustain the verdict as to defendant in error's petition or as to the amount of alimony allowed her, and because the decree creates a lien on all plaintiff in error's land instead of a portion of it as it should have done, so as not to be oppressive.

We do not think these points well taken.

The important fact that defendant in error lived apart from her husband without any fault of her own is established by the verdict of the jury appearing in the record and recited in the decree, which is final as against plaintiff in error unless he make motion in the court below to set it aside or for new trial. *Fanning et al. v. Russell et al.*, 94 Ill. 386; *Bonnell v. Lewis*, 3 Brad. 285; *Pankey v. Lang*, 51 Ill. 88.

The right of separate maintenance is therefore established as shown by the record, by the verdict of the jury upon which the decree is based.

The reasonableness of the amount of the alimony is sufficiently shown by the admissions of the plaintiff in error in his answer to defendant in error's petition for alimony in which he asserts having a farm worth \$11,000 and that he is amply able to support his wife and child.

The decree is only for the moderate sum of three hundred dollars per annum, an amount equal only to a moderate

support of his wife and child. If the amount of the alimony is too great, or the extent of the lien oppressive, application can be made under the statute for modification and in case sale of any portion of the farm is desired. *Thomas v. Thomas*, 44 Appellate Court R. 604.

Seeing no error in the record the decree of the court below is affirmed.

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98	1458
56	314
98	1440

Luthy & Co. and Ogden P. Bourland v. George F. Kline.

1. **JUDGMENTS**—*Sufficiency in Action of Replevin*.—A judgment in the following words and figures: "Now, on this day it is ordered by the court that this cause be, and the same is, hereby dismissed for want of prosecution; it is therefore considered and ordered by the court that a writ *de retorno habendo* be awarded to the said defendant," is sufficient.

2. **PRACTICE**—*Cross-examination*.—While matters somewhat remote in their bearing upon the question at issue may properly be allowed by way of a liberal cross-examination, such matters are nevertheless largely within the discretion of the trial court.

3. **TRIALS BY THE COURT**—*Presumptions in Favor of the Findings*.—A trial court is entitled to the same benefit of the law in regard to findings of facts as a jury, and its findings will be sustained unless manifestly against the weight of the evidence.

4. **FRAUD**—*Failure to State Liabilities*.—In making a statement to a mercantile firm previous to purchasing goods it is not fraud *per se* to knowingly fail to state the liabilities of the person making the statement.

Memorandum.—Action of debt. In the Circuit Court of Livingston County; the Hon. THOMAS F. TIPTON, Judge, presiding. Declaration on a replevin bond; trial by the court; finding and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 13, 1894.

APPELLANTS' BRIEF, N. J. PILLSBURY, ATTORNEY; B. F. JONES,
OF COUNSEL.

Before a defendant in a replevin suit can recover more than nominal damages in a suit upon a replevin bond he must show a judgment for the return of the goods and chattels entered in his favor in the replevin suit. *Manning*

v. Pierce, 3 Scam. 4; Hunter v. Sherman, 3 Scam. 539; King v. Ramsey, 13 Ill. 619; Lammers v. Meyer, 59 Ill. 214; Vinyard v. Barnes, 124 Ill. 346; Bouvier's Law Dic., title, *Writ pro Retorno Habendo*.

And as to certainty of judgment, see Peck v. Wilson, 22 Ill. 206; Martin v. Barnhardt, 39 Ill. 9; Faulk v. Kellums, 54 Ill. 188; Carpenter v. Sherfy, 71 Ill. 427; Scott v. Burton, 6 Tex. 322; 5 Am. Dec. 782.

A false statement by vendee of his financial condition, made to obtain credit, will justify a rescission of contract of sale by vendor made on credit upon faith of it. Schweizer v. Tracy, 76 Ill. 345; Farwell v. Hanchett, 120 Ill. 573; Reed v. Pinney, 35 Ill. App. 610; Newell v. Randall, 32 Minn. 171; 1 Benj. on Sales, Secs. 659, 673.

Whether he intends to pay for the goods or not, is immaterial. Judd v. Webber (Conn.), 11 Atl. Rep. 40; Collins v. Cooley (N. J.), 14 Atl. Rep.

Attaching or execution creditors of a fraudulent vendee are not innocent purchasers for value, and a sheriff holding the goods under his writs in favor of creditors occupies no better position than such vendees. Schweizer v. Tracy, 76 Ill. 345; Farwell v. Hanchett, 120 Ill. 573; Butters v. Haughwout, 42 Ill. 18; Ex parte Howe, 2 Paige (N. Y.) 225; Gibson v. Warden, 14 Wall. (U. S.) 249; Tousley v. Tousley, 5 Oh. St. 78.

APPELLEE'S BRIEF, G. W. PATTON, ATTORNEY; R. S. McILDUFF,
OF COUNSEL.

The mere suppression of facts as to his financial standing by a purchaser of goods, is not fraudulent, unless his intention is to obtain possession of the goods and not pay for them. Henshaw v. Bryant, 4 Scam. 97; Morris & Lewis v. Reticker, 27 Ill. App. 601.

The form of words used in the record of the judgment introduced in this case is the one commonly used to express the sentence of the law in awarding a return of the property replevied. Rankin v. Kinsey, 7 Brad. 215.

In Minkhart v. Hankler, 19 Ill. 47, the court uses the fol-

lowing language in reference to the sufficiency of a judgment, in general :

“ Whatever language may be used in the record if it is apparent what the finding of the court was, and that finding is correct in law, a judgment will not be reversed because of the use of untechnical or inappropriate words.”

This doctrine is reaffirmed in *Mapes v. Scott*, 94 Ill., page 385 of the opinion.

In *Freeman on Judgments*, Sec. 50, we find the following language: “ I think, however, that from the cases, this general statement may be safely made : that whatever appears upon its face to be intended as the entry of a judgment will be regarded as sufficiently formal if it show, first, the relief granted, and, second, that the grant was made by the court in whose records the entry is written.”

MR. PRESIDING JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This was a suit on replevin bond given by appellants to appellee, coroner of the county of Livingston, Luthy & Company being the principals and Ogden P. Bourland the security. The purpose of the bond was to fill the provisions of the statute to secure the appellee, the coroner of the county, and keep him harmless as against the sheriff. T. W. Coe, and the execution creditors of Benway & Kuntz, whose executions were in the hands of the sheriff, levied on a lot of wagons as the property of Benway & Kuntz, claimed by appellants, who had sold the same to Benway & Kuntz, dealers in general merchandise in Strawn, in Livingston county, Illinois.

The appellant, Luthy & Co., had sold the wagons to Benway & Kuntz, and had attempted to annul the sale for fraud on the part of Benway & Kuntz in making the purchase, and then had replevied the goods June 3, 1892. At the October term, 1893, of the Circuit Court, the replevin suit was dismissed for want of prosecution and judgment rendered against appellants for costs, and a writ of *retorno habendo* awarded for the wagons, but it appears that the

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judgment fails to order, in exact words, that the defendant in the replevin suit "have and recover" the goods in question.

This suit was commenced on the replevin bond in question by appellee for the use of the sheriff for the benefit of the executions, held by him in favor of various parties to a large amount in the aggregate. It appears that Benway & Kuntz were utterly insolvent at the time the replevin suit was instituted.

Appellants pleaded to the cause of action title in the wagons in Luthy & Co., to all except nominal damages.

By agreement, the cause was tried by the court without a jury, and the court found the issues in favor of appellee, and assessed his damages at \$832.50, to the value of the wagons to the amount of the judgment, in case the right of property in the wagons was in Benway & Kuntz or the sheriff. The appellants enter no complaint.

The appellants urge several objections to the validity of the judgment and the correctness of the decision of the court.

First. That the judgment is not in proper form rendered in the replevin suit, in that it fails to order a return of the property. Second. That the court erred in refusing to admit certain questions on cross-examination to be propounded to Benway. Third. The finding of the court is against the weight of the evidence. Fourth. The court erred in refusing to hold certain propositions of law asked for by appellants, to wit, Nos. 2, 3, 5, 6 and 7.

We are of the opinion that none of these points are well taken. We regard the form of the judgment in the replevin suit sufficiently technical and proper. It is true the court does not order in so many words that the defendant have and recover the property in question, but it does what we think amounts in substance to that, it enters the following order, to wit: "It is therefore considered and ordered by the court that a writ of *retorno habendo* be awarded to said defendant herein." The court considers from the fact of the dismissal of the suit, as a matter of law, that the defendant

is entitled to a return of the property, and orders that a writ issue for its return. No good purpose would be conserved by requiring a more technical rule, and we believe that such form of judgment is sustained by authority. *Stevenson et al. v. Earnest*, 80 Ill. 513; *Rankin v. Kinsey*, 7 App. 215; *Morehead v. Yeazel*, 10 App. 264; *Minkhart v. Hankler*, 19 Ill. 47; *Shirtz v. First Nat. Bank*, 47 App. 124.

The second objection made by appellants is that it was refused the right to cross-examine Benway by asking him "How many statements he had made previous to this statement to other firms." It is claimed that appellants had the right to ask this question in order to test his knowledge of the manner of making out statements, and to show that he was familiar with that kind of business, he having stated on his direct examination that he told Paul he knew nothing about it."

While this was rather remote in its bearing on the knowledge of the witness it might properly have been allowed by way of allowing a liberal cross-examination, but such matters are largely in the discretion of the trial judge and we do not think the refusal in this case would be sufficient error to cause reversal, if error at all. Besides counsel for appellant did not explain to the court the object of the question, and the court no doubt excluded the inquiry on the grounds that no other financial statement should be introduced to bear on the one in question; that such statements in themselves were not competent evidence.

Counsel for appellants made no effort to inquire into Benway's business experience which he might have done under proper limitations by the court.

As to the third point, on the question of the weight of the evidence, we think that the evidence reasonably supports the finding of the court.

The court is entitled to the same benefit of the law in regard to findings of facts as a jury, and its findings should be sustained, unless manifestly against the weight of the evidence. The mere fact that the financial statement was incorrect and did not show liabilities of Benway & Kuntz

does not itself constitute fraud and is not conclusive on that point.

If Benway's statement and explanation were entitled to credit then the court was justified in its decision.

He claims to have given it in just as Paul, appellants' agent, required, not knowing what was really necessary or required, and signed it without reading and without any intention to commit fraud on appellants or obtain goods on a false statement.

The subsequent conduct of Benway & Kuntz showed that they were not very desirous of obtaining the wagons and were not any more anxious to get them than appellant was to sell them. We can not say, all the evidence considered, that the court below found erroneously on the question of fraud.

As to the fourth and last point, we think that there was no error in refusing the propositions. The third proposition to the effect that it was fraud, *per se*, to knowingly fail to state liabilities, is not correct. Many things might excuse it and we think the court justified in finding it was not knowingly fraudulently made.

The other refused propositions as a rule were not applicable to the evidence. The fifth was that "the sheriff was not a *bona fide* holder of the goods against Luthy & Co. to rescind the contract of sale and recover the goods by replevin." It is insisted that the court by refusing this proposition, held that no matter what the evidence was, the title of the sheriff could not be attacked by appellants and that he occupied the position of an innocent purchaser of the goods in question for value. Even if the proposition were a correct statement of the law, the court was not necessarily in that attitude by refusing it. It would only be so in case it held affirmatively that the sheriff occupied the position of such purchaser. The court evidently did not try the case on the theory that the sheriff had any better title than Benway & Kuntz, as is plain from the propositions 8, 9, 10, 11, 12, 13, 14 and 15, held for appellant. Then again, the sheriff may have been such a *bona fide* holder, all the evidence con-

sidered, that Luthy & Co. could not maintain replevin for the goods. The proposition bears the construction that it holds the sheriff had no rights against a replevin suit of Luthy & Co., no matter what the proof.

The nineteenth proposition refused, required a finding of the court on the evidence for appellants, which, of course, involved matter of fact as well as of law, and the judge was not bound to give it.

Seeing no error in the record, the judgment of the Circuit Court is affirmed.

John C. Sloan v. Abe Lingafelter.

1. **VERDICTS**—*On Conflicting Evidence, Conclusive.*—Where the evidence is conflicting, the verdict of the jury is ordinarily conclusive of the controversy.

2. **INSTRUCTIONS**—*A Party's Duty to Ask, etc.*—A party litigant can not assign for error the failure of the court to give an instruction which he did not ask for on the trial of the case in the court below.

Memorandum.—Replevin. In the Circuit Court of Mercer County, on appeal from a justice of the peace: the Hon. JOHN J. GLENN, Judge, presiding. Trial by jury; verdict for defendant; appeal by plaintiff. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 18, 1894.

JAMES M. BROCK, attorney for appellant.

BASSETT & BASSETT, attorneys for appellee.

MR. JUSTICE CARTWRIGHT DELIVERED THE OPINION OF THE COURT.

This is a suit in replevin, begun by appellant before a justice of the peace, against appellee, for the possession of a steer. Appellant was defeated before the justice, and on appeal to the Circuit Court he was again unsuccessful, and there was a verdict and judgment for appellee.

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The main reason urged for a reversal, is that the verdict was against the weight of the evidence. The only question before the jury was one of identity. It appears that plaintiff had a spotted calf which was born in February or March, 1892. He marked it with a cut, or underbit as it is called, on the under side of the left ear, and by cutting the bush of hair at the end of the tail square off. Defendant had a spotted calf born in March, 1891. It had its left ear frozen, leaving it rough and notched around the edge, and the end of its tail was frozen off, so that but a few stubby hairs grew at the end. In the summer of 1893, both of these steers were turned out with other cattle of their owners, in a tract of bottom land known as Bay Island. They were put in pasture, but got out and were at large in the same locality. In the fall each of the parties thought that he had found his steer in the subject of this suit. Each party had several witnesses who were members of his family, and acquainted with his steer from its birth, and they were supported by others on each side. Plaintiff's witnesses were positive that the steer in controversy had the underbit in the left ear and the brush of the tail cut off, while defendant's witnesses were equally emphatic in denying the existence of such marks, and asserting that the left ear had been frozen, leaving it rough and notched on the edge, but that it had never been cut, and that the end of the tail had been frozen off, but the brush had not been cut. They also differed as to the age of the steer. The jury gave credence to the defendant's witnesses, and there is nothing in the evidence from which we are able to say that they were clearly wrong in doing so. The most important fact casting a doubt upon their conclusion is that the steer weighed but 685 pounds, which would indicate from the evidence that he was not as old as defendant's steer, unless very small for his age, but that fact is not of a controlling character, if he did not have the marks which defendant's steer unquestionably bore. If the ear was not cut or the tail banded, he did not belong to plaintiff. We will not disturb the finding of the jury as to the facts.

The parties agreed that the court might instruct the jury orally, and it is complained that the court in so instructing, failed to inform the jury that possession of personal property is *prima facie* evidence of ownership. Plaintiff had found the steer while running at large on the range and put it in his pasture, where defendant found it and took it away. If it would be proper on such evidence to instruct the jury that such possession of the plaintiff was any evidence of ownership, the question can not be raised here, for the reason that it does not appear that plaintiff asked the court to say anything on that subject, or raised the question in any way.

The judgment will be affirmed.

Joseph H. Muhlke v. Henry Hegerness.

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1. BURDEN OF PROOF—*Fraud and Circumvention*.—The burden of proof is on the defendant who pleads that the execution of a promissory note was procured by fraud and circumvention, to make out his defense by a preponderance of the evidence.

2. WEIGHT OF THE EVIDENCE—*For the Jury*.—The weight and sufficiency of the evidence is for the jury to judge of, subject to reversal by the Appellate Court for abuse. All reasonable intendments and allowances are to be indulged in support of the finding.

3. ORDINARY CARE—*Use of, by Maker of Promissory Note—Fraud and Circumvention*.—In cases where fraud and circumvention in procuring a promissory note is pleaded by the maker in a suit by an innocent purchaser, without notice, and for a valuable consideration, before maturity, the law requires such maker to show that he used ordinary care to protect himself against imposition, and, failing to do so, he will be held liable.

Memorandum.—Assumpsit. In the Circuit Court of Ogle County; the Hon. JAMES SHAW, Judge, presiding. Declaration on a promissory note by indorsee; plea of fraud and circumvention; trial by jury; verdict and judgment for defendant; error by plaintiff. Heard in this court at the May term, 1894. Reversed and remanded. Opinion filed December 13, 1894.

FRANC BACON, attorney for plaintiff in error.

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BAXTER & GARDNER, attorneys for defendant in error.

MR. PRESIDING JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This was a suit by plaintiff in error as indorsee of a promissory note given by defendant in error to P. Janss, as payee, dated 30th October, 1891, for \$75. The evidence showed, not contradicted, that the plaintiff in error purchased the note before maturity for \$75, January 5, 1892, of Dr. Peter Janss, the payee, without any notice of defense.

The defendant in error pleaded that the execution of the note was procured by fraud and circumvention practiced on him in obtaining his signature to the note, by representing to him that the paper about to be signed was an agreement for the doctor to send him medicine, and to bind defendant in error to take it, and that nothing was said about signing a note.

The case was submitted to a jury, which found the issues for defendant in error. Motion for a new trial was made by plaintiff in error and overruled and judgment against him for costs. From this judgment this appeal is taken.

The only error relied on is that the verdict was manifestly against the weight of the evidence. It is only on a question of fact that we are called upon to review the case and to decide whether the evidence sustains the verdict.

This case is governed by the same rules of law in regard to question of fact as other cases.

The burden of proof is on the defendant who pleads, to make out his case by a preponderance of the evidence, of the weight and sufficiency of which the jury is the judge, subject to reversal by this court for abuse of its powers. This court is required by law to carefully consider the evidence and to refuse to set aside a verdict, except in cases where it is manifestly against the weight of the evidence.

All reasonable intendments and allowances are to be given in support of the verdict.

In this class of cases a person who signs a negotiable instrument must use ordinary care to protect himself against

imposition, and failing to do this he will be held to pay the sum mentioned in it, if in the hands of an innocent purchaser, for value, before maturity. In the case at bar the payee of the note claimed to be a practitioner of medicine located in Chicago, and president of the Illinois State Medical and Surgical Institution, also located there. And the evidence shows that he was in fact a licensed physician.

The issue in question rests entirely on the evidence of the defendant in error on the one side, and the payee of the note on the other, and the accompanying circumstances. The evidence shows that at the date of the note the payee took a livery team at Rochelle, and with a driver, Walters, went into the country where defendant in error was in the field husking corn, to procure him a patient to be doctored by him. Walters was about four rods away in the highway. What took place is only shown by the testimony of the two parties.

The defendant in error testified he was a Norwegian by birth, and had been in this country ten years, and was then thirty-two years of age; that he had never attended English schools, and was not acquainted with Dr. P. Janss; that the latter came to his, witness' place, and said that he was president of the Illinois State Medical Institution, and asked what was the matter with him. Witness said his eyes were sore; the doctor looked at them and said they were bad; the witness replied that "isn't the worst." Had some other sickness that was worse. The doctor said he had experience in that sickness and had cured many. The appellee asked how much he would charge and the doctor told him he would charge \$75. Showed him a paper and said it was an agreement. The appellee said, "I signed a paper there. I did not read it. I asked him to read it. He said it was an agreement for him to send the medicine and bind me to take it. I was to get it in the express office. There was no one else present. * * * He had a pen and furnished it to me and I signed it on a wagon tongue. He then put the paper in his pocket and gave me a paper in an envelope, which was shown in evidence and was a printed blank, one side printed in English and the other in German. It was a

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direction how to send for medicine and blank spaces to be filled up showing appellee's symptoms. The appellee further testified that there was nothing said about signing a note, and the first he knew about it was when he was notified it was due; that when he signed the paper there was a liveryman a little ways from him, about four rods, and appellee did not know him. Selglid was in the other end of the field about seventy rods off. Mr. Hedge lived about forty, and Lilly about thirty, rods from him, and each had three or four members in family. The appellee testified he tried to read the paper and could not, and stated he could not read writing or printed matter in the English language; that he had made an affidavit to get the judgment set aside in which he stated that he could not read very well. When the doctor handed him the paper he told him he could not read, and he explained it to him and he signed it; that was all he did to learn what was in the paper.

The payee of the note, Dr. Janss, testified in form of deposition to visiting the appellee, October 30, 1891, and of entering into a contract with him for medical treatment for loss of manhood, kidney trouble and complications, for a term of six months, and if not cured, then to treat him free of charge. The doctor identified the note sued on and testified that appellee gave it to him and he gave him back a receipt containing all the terms of the contract, which receipt was introduced in evidence. The receipt recites the reception of the note in question and the terms of the agreement for medical services, and that appellee was to pay \$12.50 monthly to be indorsed on the note, etc.

Both the appellant and the payee prove by their evidence the purchase of the note by the former for a valuable consideration without notice of any defense and before due. This, in substance, was the testimony.

We are inclined to think, everything considered, that the evidence shows a want of ordinary care on the part of the appellee, in signing the note, even if his claim is well founded, that he signed it on account of the misstatements of Dr. Janss, and in ignorance that it was a note. The evidence shows that the liveryman, Walters, whom appellee

had seen before, was present within three or four rods, and he also had near neighbors, and that the payee of the note was a total stranger to appellee, yet, according to his own testimony, he signed it simply on the statement of the doctor that it was an agreement to take medicine, without referring it to Walters to be read. The Supreme Court, in two similar cases, in commenting on such circumstances with reference to the negligence of the maker of a note, has held that the signer of such note under such circumstances "can not be regarded" as in the "use of diligence and proper precaution" and held that "due care required that he should have called upon those who were near by, and on whom he could rely, to read the papers for him." *Swonnell et al. v. Waterson*, 71 Ill. 456; *Harris v. Hale*, 71 Ibid. 552.

We do not wish to be understood as holding that where a party can not read, there may not be cases where the failure to call on bystanders to read the instrument before signing would be excusable, and where negligence would not be imputed by reason of such failure. Each case depends upon its own circumstances. *Sims et al. v. Bice*, 67 Ill. 88; *Richardson v. Schirtz*, 59 Ill. 313; *Munson, use, etc., v. Nichols*, 62 Ill. 111; *Strong v. Linington*, 8 Brad. 445.

But in the case at bar we see no excusable circumstance which would tend to free appellee from the charge of negligence in not calling on Walters to read the note or paper proposed to be signed, before signing it. Had he done so, if fraud was being attempted, it would have been discovered, or at least appellee would have been freed from the charge of negligence.

Then appellee held Dr. Janss' receipt, plainly stating in it that he had received appellee's note for \$75, and how appellee could have kept that paper till after the note was due and he was asked to pay it without discovering that he had given a note, we can not comprehend. We are inclined to think from the entire evidence that appellee knew he was giving the note at the time. At least the jury were not justified in finding appellee free from negligence.

The judgment of the Circuit Court is reversed and the cause remanded.

**Chicago, Santa Fe & California Railway Company v.
Mary L. Ashling, Administratrix, etc.**

1. **CONSOLIDATION OF RAILROADS—***Confined to Companies Organized Under the Laws of This State.*—While the act of 1885 permits a railroad corporation organized under the laws of this State to become the purchaser of certain railroads and corporate powers of the same, organized under the laws of this and other States, it expressly withholds such power from corporations organized under the laws of other States.

2. **SAME—***No Provisions Directing the Manner Under the Act of 1883.*—There are no provisions in the act of 1883, directing the manner of the consolidation of railroad corporations organized and doing business under and by virtue of the laws of this State.

3. **SAME—***What is in Effect a Consolidation.*—When one railroad company acquires the entire franchise of another company, and issues, by way of purchase of such franchise and property, its stock, dollar for dollar, to the stockholders of the absorbed corporation, changing their rights as stockholders from the selling to the purchasing company in common with the stockholders of that company the two companies are consolidated as effectually as they could have been in any other method.

4. **SAME—***Notice of Stockholders' Meeting.*—The object of the statute in requiring sixty days notice of the stockholders' meeting to be convened, for the purpose of approving such consolidation, is for the benefit of the stockholders, and not for the public. If they see fit to appear at the meeting and participate therein, such action would be a waiver of the right to the statutory notice.

5. **SAME—***Liability for Debts, etc.*—Where a claim and cause of action exists against a railroad company prior to its consolidation with another company and suit is instituted, the debt must be held to have existed and cause of action accrued prior to the consolidation.

6. **SAME—***Suits Pending.*—Under section 56, chapter 32, R. S., the consolidation of one corporation with another does not affect suits pending, in which such corporations are parties, as to the causes of action nor the rights of the parties. The corporation intervening and absorbing the defendant corporation, should be treated as a mere volunteer and acquiring rights *pendente lite*.

7. **SAME—***Plaintiff Not Bound to Change His Suit.*—A plaintiff in a suit pending against a railroad corporation is not bound to amend his declaration, because the defendant has, pending the same, consolidated with another corporation, and make such other corporation a party; the claim becomes merged in the judgment recovered and the same may be recovered of the consolidated company in an action of debt.

Memorandum.—Action of debt. In the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding. Declaration

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on a judgment; pleas *nil debit*, *nil tuel record* and special plea denying consolidation; jury waived and trial by the court; finding and judgment for the plaintiff; error by the defendant. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 13, 1894.

BRIEF OF PLAINTIFF IN ERROR, EDGAR A. BANCROFT AND
REEVES & BOYS, ATTORNEYS.

When in the action against the St. Louis Company judgment was obtained, the cause of action against that company was "merged in the judgment, lost its vitality and expended its force and effect." Black on Judgments, Sec. 674; Ries v. Rowan, 11 Fed. Rep. 657; Schuler v. Israel, 27 Fed. Rep. 851; Freeman on Judgments, Sec. 216; Runnemaker v. Coudray, 54 Ill. 303.

The liability of the Santa Fe Company could not be affected either in its form or character by any litigation to which it was not a party. It was entitled to litigate the claim against it which, if it existed, became complete and perfect at the time of the consolidation, and no transformation of it into a judgment could be had until it was regularly brought into court. Prouty v. L. S. & M. S. R. Co., 52 N. Y. 363; L. R. & D. R. Co. v. Hardin, 40 Ga. 707; Texas & P. R. Co. v. Murphy, 46 Tex. 356.

To the same effect are Temple v. Scott, 3 Minn. 419; Rogers v. Odell, 39 N. H. 452; McGilvray v. Avery, 30 Vt. 538; Barnes v. Gibbs, 31 N. J. Law, 317; Marshall v. Aiken, 25 Vt. 328; H. & T. C. R. R. v. Shirley, 54 Tex. 125; Smith v. Chicago, etc., R. R., 18 Wis. 1; 1 Rorer on Railways, 91.

BRIEF OF DEFENDANT IN ERROR, CHARLES WHEATON, SAMUEL
RICHOLSON AND WILLIAM L. SEELEY, ATTORNEYS.

Where a consolidated company became, by virtue of the consolidation, liable for the debts of the companies composing it, the creditor's remedy is complete and adequate at law, and a court of equity will not assume jurisdiction to enforce it. Arbuckle v. The Ill. Midland Railroad Co. et al., 81 Ill. 429; St. Louis, etc., R. R. Co. v. Miller, 43 Ill. 190.

The consolidation of two companies does not necessarily

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work a dissolution of both. Whether such be its effect, depends upon the legislative intent manifested in the statute under which the consolidation takes place. *Day v. Worcester, etc., R. R. Co. (Mass.)*, 23 N. E. Rep. 824; *C., M. & St. P. Ry. Co. v. Chicago Bank*, 134 U. S. 276; *Central Railroad and Banking Co. v. Georgia*, 92 U. S. 625.

The burden of proof is upon those who deny the regularity of a meeting for want of notice to prove it. *Sargent v. Webster*, 13 Met. (Mass.) 504.

When a quorum is present at the meeting, the law presumes, in the absence of proof to the contrary, that the proper notice was given. *Rorer, R. R.*, 191; *Mut. Fire Ins. Co. v. Shortwell*, 8 Allen (Mass.) 217; *Com. v. Noelper*, 8 Serg. & R. Penn. 29.

MR. PRESIDING JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This was a suit in an action of debt by defendant in error against plaintiff in error, to recover the amount of a judgment rendered in the Circuit Court of La Salle County in favor of the defendant in error against the Chicago & St. Louis Railway Co. for \$5,000 and interest, of date May 7, A. D. 1891, on a certain cause of action accruing prior to June 6, 1886, for wrongfully killing Edward W. Ashling, deceased, and for recovery of which suit was brought on said latter date. This suit was brought based on said recovery to the January term of the Circuit Court, A. D. 1893, and judgment recovered for \$5,183.85, and costs of suit. To reverse this judgment this writ of error issued out from this court. The declaration consists of two counts. The first alleges the recovery of the judgment above stated and that the same was brought in an action on the case; that the Chicago & St. Louis Railroad Company was duly consolidated with the said Chicago, Santa Fe & California Railway Co., a corporation then existing under the laws of this State, and the defendant in that suit under the statutes of the State of Illinois, and thereby became part and parcel of the said Chicago, Santa Fe & California Railway Company, the defend-

ant, and incorporated herewith, etc., and that the two companies became one company under the name of the Chicago, Santa Fe & California Railway Company.

The declaration then avers liability under the statute for liabilities of either company existing or accruing prior to such consolidation, etc.

The declaration further avers that the liability against the Chicago & St. Louis Railway Company accrued February 23, 1886, and action was commenced against said company prior to said consolidation, to wit, June 6, 1886. The second count set up the same facts and claims and avers common law liability.

The proof showed the recovery of the defendant in error against the Chicago & St. Louis Railway Company, as alleged, and other material allegations were supported by proof. The defendant in error introduced a deed of conveyance from the record books from the recorder's office in La Salle county, an instrument purporting to be a deed of conveyance of the railroad and franchise in pursuance of a sale from the Chicago & St. Louis Railway Company to the plaintiff in error, consideration being one dollar and the issuance of stock from plaintiff in error to the holders of stock in the C. & St. L. R. W. Co. to an equal amount held by them in the latter company, and also agreeing to pay all the bonded indebtedness of the said last named company, due or to become due. The defendant in error introduced the record of the directors' meeting of each of the companies of December 15, 1886, by which the proposed sale and purchase was authorized by each, and also a meeting of all the stockholders of each company at same time, by which in each case the action of the directors, respectively, was ratified by each company's respective stockholders, by unanimous vote of each set of stockholders; also a copy of plaintiff in error's by-laws authorizing a meeting of the stockholders of its company, when all were present.

The deceased was killed while running a train on the C. & St. L. R. W. Company's said road, February 23, 1886, by an explosion of the boiler caused by the negligence of the

company, as found and established by the verdict in the former suit against that company.

The right of recovery in this case is based on Sec. 65, Chap. 32, Revised Statutes, passed March 9, 1887, and in force May 9th of the same year, entitled "An act in relation to the consolidation of incorporated companies," and which act is incorporated in Chap. 32, entitled "An act concerning incorporations," in force July 1, 1872. The act reads as follows: "In all cases when any company or corporation chartered or organized under the laws of this State, shall consolidate its property, stock or franchises with any other company or companies, such consolidated company shall be liable for all debts or liabilities of each company included in said consolidated company, existing or accrued prior to such consolidation; and actions may be brought and maintained and recovery had therefor against such consolidated company."

At the time the above act was passed there was no statute directing the mode and manner of effecting a consolidation of two railroad companies, nor has there since been one passed, though there were several sections regulating some of the details. Sec. 22, Chap. 114 R. S., 1078, prohibited the consolidation of parallel lines and required sixty days notice to be given to stockholders in manner provided in Sec. 15, of the same act. Section 2 (41), Chap. 114, R. S., 1081, in force July 1, 1883, provided that "such consolidation shall take effect upon the filing and recording of such articles of consolidation in the office of the secretary of state of the State of Illinois, and a certified copy thereof in the office of the recorder of the various counties in which the said road is situated. A certified copy of such articles of consolidation under seal of the secretary of state, shall be deemed and taken to be *prima facie* evidence of the existence of such consolidated corporation."

The last provision of the statute has no application to the consolidation of two railroads like the one in question, but applies to roads existing partly in this and partly in other States, and consolidated, and then sold in pursuance to a decree of court, as provided for in Sec. 1 of the same

act of July 1, 1883, and to which only the section in question relates. The Chicago & St. Louis Railway Company, and the Chicago, Sante Fe & California Railway Company, was each a corporation organized and doing business under and by virtue of the laws of the State of Illinois, and could not be consolidated under the provisions of the act in force July 1, 1883. So far as we see from the statute, there was no provision therein directing the manner of consolidation of railroad corporations, situated as the above last named corporations, unless it was derived from the act in force July 1, 1885, entitled "An act to increase the power of railroad corporations," which provided for the consolidation of railroad corporations organized or to be organized under the laws of this State and other States by purchase by corporations of this State, and authorizing them to hold such railroad in fee simple or otherwise, and to use and enjoy the railway property. Corporate rights and franchises of the company or companies owning such other road or roads may be affected upon such terms and conditions as may be agreed upon between the directors and approved by the stockholders owning not less than two-thirds in amount of the capital stock of the respective corporations becoming parties to such purchase and sale, unless Sec. 53, Chap. 32, Hurd's Revised Statutes, p. 370, can apply. We do not think, however, that it applies to railroad corporations, those being governed when consolidated by purchase, by the above statute of 1885.

While the act of 1885 permits a railroad corporation organized under the laws of this State to become the purchaser of certain railroads and corporate powers of the same, organized under the laws of this and other States, it expressly withholds such power from corporations organized under the laws of other States. The act further provides for sixty days notice to be given to the stockholders, of the annual or special meeting of the stockholders of each corporation, at which the question of purchase is to be acted on, by publication in a newspaper published in the county where the principal business office of the corpora-

tion is situated, and thirty days notice through the mail, and no railroad corporation is permitted to purchase any parallel or competing line of railroad with any line or road operated by such corporation, and no recording of papers is required to make the sale or consolidation perfect.

It is claimed by plaintiff in error, and probably correctly, that the defendant in error purchased the property and franchise of the Chicago & St. Louis Railway Company under the provisions of the above statute. But it is insisted that such purchase is not a consolidation of the two corporations in question within the meaning of the statute above quoted, making the consolidated company liable for the debts or liabilities of each company included in said consolidated company existing or accruing prior to such consolidation. We are of the opinion that this point is not well taken. While the statute denominates the transaction a purchase, the thing authorized to be done, and what was done in this case, was in fact a consolidation within the meaning of the term used in the above quoted statute. What was done in this case by the purchase? First, the plaintiff in error acquired the entire franchise held by the Chicago & St. Louis Railway Company held by its charter. Second, it issued by way of purchase of such franchise and property, its stock, dollar for dollar to the stockholders of the absorbed corporation. Their rights as stockholders were simply changed from the selling to the purchasing company, and the stockholders in the latter company became common stockholders with them in that company. In other words the stock and franchises and property of the two companies became common and are in the plaintiff in error; they were consolidated as effectually as they could have been in any other method. It is true that the plaintiff in error assumed the obligation of the bonded indebtedness of the Chicago & St. Louis Railway Company, but this was nothing more than doing by agreement what the statute imposed on the consolidated company without it.

It is insisted, however, that the purchase or consolidation was void, because no notice of the stockholders' meeting was

shown as required by the statute; that the object of the statute in requiring sixty days notice was not only for the benefit of the stockholders but also for the "information and benefit of the people of the State who might desire to invoke the power of the State through the courts to prevent such proposed consolidation."

We can not hold to this view. While we are aware that the consolidation of parallel and competing lines of railroad is prohibited by the constitution and statutes, we do not think that the requiring of the notice had any purpose in view other than the protection of stockholders. The constitution, Sec. 2, Art. 2, 1870, requires the notice to be given to the stockholders, and the act of the legislature answering to this provision of the constitution requires the notice to be given to the stockholders, and not the public. The public loses no rights by the consolidation or attempted consolidation. There is no machinery provided by the statute whereby proposed illegal consolidations may be prevented by injunction or otherwise, conceding that notice should be given to the public of a proposed consolidation of railroad corporations.

The by-laws of plaintiff in error provided that a meeting of stockholders of the company could be held at any time or place, whenever all the stockholders were present and every stockholder voted for the purchase or consolidation, the same as was done by the by-laws of the stockholders of the Chicago & St. Louis Railway Company. The object of the notice was accomplished, to wit, the presence of the stockholders. If they saw proper to appear at the meeting and participate therein they thereby waived the right to the statutory notice the same as a litigant in court may waive the statutory notice of the pendency of a suit against him.

The plaintiff in error insists that the judgment sought to be recovered on in this case having been rendered subsequently to the consolidation, was not a liability of the Chicago & St. Louis Railway Company existing or accrued prior to such consolidation within the meaning of the statute above quoted creating such liability. However, under other

circumstances and conditions, such might be a proper holding, we must hold under the peculiar provisions of our statute, the fact that the claim and cause of action existed prior to the consolidation or sale, and suit had also been instituted on it by appellee against the Chicago & St. Louis Railway Company prior to the consolidation and sale with and to the plaintiff in error, that the debt must be held to have existed and the cause of action accrued prior to the consolidation.

Sec. 56, Chap. 32, Hurd's R. S., p. 371, provides, among other things, that "consolidation of one corporation with another shall not affect suits pending in which such corporations shall be parties, nor shall such changes affect causes of action, nor rights of persons in any particular; nor shall suits brought against such corporation by its former name be abated for that cause." We think the object of this statute was to hold the rights of a litigant plaintiff in actions against corporations becoming defunct after the institution of suits and absorption by other corporation or corporations, the same as though judgment had been obtained prior to the consolidation.

The corporation intervening and absorbing the defendant in litigation should be treated as a mere volunteer and acquiring rights *pendente lite*, and thus the statute intended to treat it. Such consolidation provides the statute is not to "affect suits pending" or "causes of action" nor the rights "of persons in any particular," nor shall the suits "be abated for that cause."

The defendant in error's cause of action had accrued and suit had been instituted; the plaintiff in error came in as a mere volunteer and absorbed the defendant and its property pending litigation.

The defendant in error had a right of action at the time against the C. & St. L. Ry. Co. and against plaintiff in error, the moment the consolidation took place; such rights were not, by the statute, to be affected in "any particular" by the consolidation. The defendant in error could legally proceed against the absorbed company to establish her rights.

We think by so doing the cause of action does not lose its identity, and the judgment should be treated as having been recovered before the consolidation or purchase.

If the judgment had been rendered prior to the consolidation, there could be no question as to defendant in error's rights, so far as this point is concerned. As the plaintiff in error consolidated the defendant company, and as the statute intended to hold all litigation *in statu quo*, so far as pending litigation was concerned, we do not think defendant in error was bound to amend her declaration and make plaintiff in error a party on peril of losing her rights. The point made is a technical one at best and devoid of equitable considerations. The case of *Boynton v. Ball*, 105 Ill. 627, we do not consider in point. A judgment recovered after adjudication in bankruptcy creates a new debt and the old one can not be proven against the bankrupt estate.

The debt becomes merged in the judgment. This should be so on equitable grounds; the debtor sues in court instead of having his claim allowed; if no defense is made by showing the bankruptcy, the plaintiff acquires a personal judgment against the bankrupt, against which the bankrupt's certificate of discharge would not operate.

For this reason it would appear equitable to treat his claim as merged in the judgment. There might be many other cases where it would be equitable to do so, but in many it would be highly inequitable.

We think, on the facts of the case, which are all substantially undisputed, that the defendant in error had a right of recovery, and the holdings or refusals of holdings of law by the court are immaterial. The judgment of the court is affirmed.

W. E. Scobey v. The Town of Manteno.

1. *PAUPERS—Liability of Towns for Services Rendered.*—A town is not liable for the services of a surgeon, rendered to a poor person, resident of the town, at the request of the county physician, and not at the request of the overseer of the poor, or any other officer of the town.

Scobey v. Town of Manteno.

Memorandum.—Assumpsit for services. In the Circuit Court of Kankakee County, on appeal from a justice of the peace; the Hon. CHARLES R. STARR, Judge, presiding. Trial by jury; verdict and judgment for defendant; appeal by plaintiff. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 18, 1894.

EDWARD E. DAY, attorney for appellant.

HARRISON LORING and WILLIAM POTTER, attorneys for appellee.

MR. JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

While a freight train was standing at a street crossing on the Illinois Central railroad in the town of Manteno, Henry Cordiere, a resident of the town, attempted to cross the track by crawling under the cars.

Before he could pass under, the train started; he was caught by one of the car wheels and one of his legs was so badly injured as to render its amputation necessary. The conductor of the freight train put him on an approaching passenger train and sent him to Kankakee, nine miles distant, and telegraphed the station agent at Kankakee.

In response to a telephone message, the appellant and one Dr. Way, surgeon for the Illinois Central Railroad Company at Kankakee, appeared at the depot and took charge of Cordiere. Cordiere was removed to the county poor house where his leg was amputated by appellant, Dr. Way, and the county physician assisting in the operation. Cordiere was a common laborer, without means, and this suit was brought by appellant to recover from appellee \$75 for performing the operation. A trial resulted in a verdict and judgment for appellee.

That Cordiere was a resident pauper of the town of Manteno is the theory on which a recovery is sought.

The evidence shows that he had never been a pauper charge up to the time of receiving the injury. He had for years worked in different lines of unskilled employment, earning from one dollar to a dollar and a half per day, but

had accumulated no property. He did not come within the definition of pauper, but within the class mentioned in section 24 of the Pauper Act. "Where any non-resident or any person not coming under the definition of a pauper of any county or town, shall fall sick, not having any money or property to pay his board, nursing and medical aid, the overseer of the poor of the town or precinct in which he may be, shall give or cause to be given to him such assistance as they may deem necessary and proper, subject to such rules and regulations as the county board may prescribe." 2 Starr and Curtis' Annotated Statutes, 1737.

Under the circumstances, as disclosed by the evidence, appellee was not liable. The services were not performed upon the request of the overseer of the poor or any other officer of the town, nor within the town. They were performed at the county poor house at the request of the county physician.

Appellant was called to the case in the first instance because he was the local surgeon for the railroad on which Cordiere had been injured, and when the patient was sent to the poor house, he went there and performed the amputation, because requested to do so by the medical attendant of the institution.

Whether the county is liable is not before us, and we do not desire to be considered as intimating any view upon that question. We see nothing wrong with the instructions. Judgment affirmed.

**Rockford Insurance Company v. Josiah G. Williams,
Executor of the Will of Lavina Calkins, for
the use of Ellen E. Calkins.**

1. *INSURANCE—Waiver of Condition in the Policy.*—The insured held a policy containing provisions that it should be null and void if the insured was not the sole and unconditional owner in fee of the property, or if it should become mortgaged or in any manner incumbered. He conveyed the property to a daughter-in-law upon conditions, etc., taking

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a mortgage upon the same to secure the purchase money. The policy was assigned to her and sent to the agent of the company with a statement of the nature of the title held by the grantee of the property. The agent consented to the assignment and did not object to the title of the assignee. *It was held* that the condition of the policy was waived.

2. **INSURANCE COMPANIES—Bound by Statements of Agents.**—An insurance company is bound by the acts of its agent, in the exercise of powers within the apparent scope of his authority.

3. **VARIANCE—Objection Must be Specific.**—The general objection that the proof varies from the declaration is too general in its terms to save the question of variance.

4. **SAME—Objection Must be Made in Apt Time.**—The objection of a variance between the pleadings and the proof must be made in apt time in the court below and the variance pointed out.

5. **WITNESS.**—A witness may make a mistake which may cast a doubt upon the accuracy of his recollection of a certain transaction, but it does not necessarily follow that he is not worthy of belief.

Memorandum.—Assumpsit. In the Circuit Court of Iroquois County; the Hon. CHARLES R. STARR, Judge, presiding. Declaration on an insurance policy; trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 13, 1894.

CHARLES A. WORKS, attorney for appellant.

FRANK L. HOOPER, FREE P. MORRIS and CHARLES W. RAYMOND, attorneys for appellee.

MR. JUSTICE CARTWRIGHT DELIVERED THE OPINION OF THE COURT.

This suit was begun by Lavina Calkins to recover for the use of Ellen E. Calkins for the loss by fire of a barn upon which appellant had issued its policy of insurance to the amount of \$800 to said Lavina Calkins, and which had been assigned by her to said Ellen E. Calkins with the consent of appellant. During the pendency of the suit Lavina Calkins died and her executor was substituted as plaintiff. There was a trial and plaintiff recovered \$927.50, the amount of the insurance and interest.

By the provisions of the policy it was to be null and void if the assured should not be the sole and unconditional owner in fee of the property both at law and in equity, or

if the property should become mortgaged or in any manner incumbered, and any loss occurring was to be paid after receipt and acceptance by the secretary of defendant of customary and proper proofs made by the assured under oath. The conditions as to title and incumbrance were both violated and no proofs of loss were furnished, but a right to recover was claimed and established on the ground that all of said provisions had been waived by defendant.

The barn was situated on a farm of 200 acres owned by Lavina Calkins, to whom the policy was issued. On November 21, 1889, Lavina Calkins and husband made a conveyance of said premises to Ellen E. Calkins, wife of their son, J. M. Calkins, "as long as the said Ellen E. Calkins remains the wife of J. M. Calkins or his widow, and in case of the death of Ellen E. Calkins or re-marries, the fee simple shall be in the heirs of the said J. M. Calkins' body, provided that certain promissory notes given for the purchase money has been paid." On the same day Ellen E. Calkins gave a mortgage to Felix W. Calkins for said purchase money amounting to \$10,000, divided into notes maturing annually up to January 1, 1910, with interest after due at eight per cent, and the notes were indorsed by him to said Lavina Calkins. The policy of insurance was assigned by said Lavina Calkins to Ellen E. Calkins February 11, 1890, and was sent to defendant by said Felix W. Calkins for its consent. The consent of the defendant was indorsed on the policy February 13, 1890, subject to its terms and conditions, and it was returned.

The question whether the provisions of the policy as to title in fee and incumbrance were waived, depends upon whether or not Felix W. Calkins sent with the policy to defendant when it was forwarded for consent to the assignment, a statement of the nature of the title held by Ellen E. Calkins and of the incumbrance. He was very positive at the trial that he sent such a statement, and on the other hand its receipt by defendant was positively denied by the assistant secretary of defendant having charge of the assignment of policies and indorsements thereon. There

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was a letter received with the policy by defendant which contained no statement on those subjects. The alleged statement was said by Felix W. Calkins to have been written on another piece of paper, and he was certain that he pinned it on over a slip pasted on the policy permitting the use of gasoline. The policy has been sent to this court, and there are holes at the place indicated as the one where the statement was pinned, but they were both apparently made with some sharp pointed instrument from the face of the policy and not by the use of a pin in fastening a paper on the policy as claimed. He must have been mistaken in that particular, and, judging by the record merely, that mistake casts much doubt upon the accuracy of his recollection as to the other details of making and sending the statement; but it does not necessarily follow that he was unworthy of belief, and we can not say that the jury were clearly wrong in concluding that he sent the statement with the policy, although not pinned to it. The barn was burned November 29, 1890, and a letter was written December 1, 1890, by Felix W. Calkins to defendant, asking to have the loss adjusted. Afterward, J. M. Calkins, at the instance of his wife, made three trips to Kankakee, Illinois, to see James Dolan, who is claimed to have been an agent and adjuster of defendant, about the loss. He did not find Dolan until the third trip, when they met in a saloon in Kankakee, and, although the evidence was contradicted by Dolan, the jury were justified in finding that Dolan, in response to an inquiry as to what defendant would do about the loss, said that it would not pay it because it was not notified about the mortgage on the property.

It is contended that Dolan did not sustain such a relation to the defendant as authorized him to speak for it on that subject, so as to make a refusal to pay on the ground stated a waiver of other grounds. The evidence was that Dolan had been in the employ of defendant for about twenty years. He was working on a salary, as an agent of defendant, looking after agents, visiting them, making contracts with them, looking over their accounts, adjusting losses,

making collections, etc. He had adjusted a great many losses, covering a good many years. He had cards for use furnished by defendant, on which he was designated as special agent and adjuster for defendant. The method adopted to set him to work, as adjuster in any case, was to send him a notice of the loss on a printed blank, prepared by defendant, and, in this case, such a notice was sent him on the usual blank, and he went to Watseka in pursuance of it and investigated the title to the property in question. He found the mortgage which apparently rendered the policy void, and made his report to defendant of that fact, and did nothing further in the matter. It seems that he was an adjuster of defendant, and had been engaged as such in this matter. We think that his statement of defendant's ground for refusal to adjust the loss would bind defendant.

The date of the deed from Lavina Calkins to Ellen E. Calkins, and the estate conveyed, were not correctly given in the declaration, and the date and amount of the mortgage made by Ellen E. Calkins and the name of the mortgagee were wrong. It is now objected that the proofs in those particulars were variant from the averments of the declarations. The deed and mortgage were each admitted in evidence without objection, and no objection to them on account of variance was made at any time on the trial. A motion was made, after the evidence was all in, to exclude the testimony and direct a verdict for defendant, but the motion was not put upon the ground of variance which was necessary to make that objection available. *Libby, McNeill & Libby v. Scherman*, 146 Ill. 540.

There were some objections made on the trial, on the ground of variance, but they were not well taken, since they related to immaterial dates, each averred under a *videlicet*, or where the averment corresponded with the legal effect of the transaction, and the variance was not substantial. Some instructions asked by defendant were refused, but they were merely attempts to take advantage of supposed variances, without pointing them out, and they were properly refused.

It is objected that the recovery was too large because of

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the nature of the estate of Ellen E. Calkins in the property. The barn was worth from \$1,000 to \$1,200 and all the notes that were due had been paid. We think that she was damaged by the destruction of the barn to the amount of the insurance.

Objection is made to remarks of counsel for plaintiff in his closing argument to the jury. Objections were made at the time and sustained by the court. The jury were informed that the remarks were improper as they unquestionably were. In view of the action of the court, we think they do not afford ground for reversal. Seeing no reversible error in the record, the judgment will be affirmed.

Josiah Matzenbaugh v. Robert Doyle.

56	343
156a	331
56	343
61	475

CONFESSION OF JUDGMENT—*Statute of Limitations.*—In a case of confession of judgment by *cognovit*, it is necessary to show by the record that the power to confess the judgment was in existence; the presumption is that if by the running of the statute of limitations the debt is barred, the power to confess judgment contained in the power of attorney is also barred.

2. **SAME—*Void for Want of Proof of the Execution of the Power.***—A judgment by confession is void where the power of attorney under which it is confessed is not accompanied by an affidavit showing its execution.

3. **JUDGMENTS—*Must Stand or Fall by the Record.***—A judgment record must either stand or fall, by what is contained in it. It can not be aided by extrinsic proof. If entered by confession, and it appears on the face of the record that the power of attorney, by virtue of which the confession was made, is barred by the statute of limitations because the debt is so barred, the judgment is void.

4. **SAME—*By Confession in Vacation.***—The confession of a judgment in vacation is a statutory proceeding in derogation of common law, and a judgment so confessed will not be held valid, unless there is a strict compliance with the statute.

Memorandum.—Confession of judgment. Appeal from the Circuit Court of Iroquois County; the Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 13, 1894.

KAY & KAY, attorneys for appellant.

DOYLE & HILSCHER, attorneys for appellee.

MR. PRESIDING JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This was a confession of judgment by appellant by power of attorney contained in the promissory note upon which judgment was confessed. The confession was taken in the Circuit Court, upon which judgment was rendered in vacation November 3, 1890, for \$1,482.57 and costs, by the clerk.

The note upon which the judgment was confessed bears date May 16, 1878, for \$1,075, due in thirty days, drawing ten per cent interest after due. There were no payments indorsed on the note, or anything on file to show any payments had been made or new promise in writing within ten years, prior to the entry of the judgment. Apparently, from the note and all papers on file, the statute of limitations had run against the note and the note had never been renewed. No execution was ever issued on the judgment, but in October, 1893, *scire facias* to revise the judgment was issued out of the Circuit Court and served on appellee, returnable to the November term, 1893, of the Circuit Court. On November 7, 1893, appellee moved the court to vacate the judgment and on the 7th March, 1894, the court decided the motion in appellee's favor, and vacated the judgment, from which order of vacation this appeal is taken. Before the hearing appellant filed his affidavit, showing payments on the note from 1878 to June 16, 1883, which by agreement between appellant and appellee was to apply as credit on the note, amounting in the aggregate to \$809.29. This affidavit was objected to and held by the court to be incompetent.

The question presented by this record has probably never been passed upon by the Supreme Court of this State, but, as we think, analogous questions have. It has been held that a judgment by confession is void, where the power of attorney is not accompanied by an affidavit showing its exe-

cution, and is of no force and effect whatever. *Gardner v. Bunn et al.*, 132 Ill. 403; *Stein et al. v. Good*, 115 Ill. 93.

In the latter case in its comments concerning the policy of the law the court says: "In this class of cases where the whole proceeding is *ex parte* and the papers filed constitute a part of the record without any bill of exceptions making them so, public interest would seem to demand that some evidence should appear in the record showing unequivocally that the judgment was confessed by authority of the defendant in the judgment, or in other words, showing the power of attorney on file was actually executed by him."

But in a case like the one at bar, it would seem to us that there was as much necessity to show by the record that the power to confess judgment still existed as to show its existence in the first instance, where on the face of the papers it clearly appeared that the power had expired. The presumption is clear that by the running of the statute of limitations the debt had been barred and the agency to confess judgment contained in the power of attorney had expired.

A judgment record must either stand or fall by what is contained in it, and it can not be aided by extrinsic proof. The judgment in a case like this after the power had expired would appear on its face void, and a confession of judgment without authority of law. There is as much reason for holding that after, *prima facie*, the power to confess judgment had expired by limitation, it should be shown by affidavit filed that it had been revived, as to show its execution in the first instance. In *Emery v. Keighan et al.*, 88 Ill. 482, it was held that a sale under power of attorney in a mortgage after the running of the statute of limitations was *prima facie* void, and such deed could not be read in evidence in an action of ejectment to sustain title without proof of the execution of the power in some way recognized by law. See, also, same case in 94 Ill. 543.

In case of the judgment in question, suppose sale of real estate had taken place under an execution issued on it, and it had ripened into a supposed title; could such a title be read in evidence, where it appeared from the face of the

judgment the attorney had no power to confess judgment? And a judgment of this kind can not be sustained and aided by parol proof.

In our judgment the analogies, as well as the policy of the law, would forbid courts sustaining a judgment like the one at bar.

If such a judgment as this can be sustained, the maker of a note with a power may be harassed for many years after the statute of limitations had run against it, by confession of judgment by virtue of a long extinguished power. The safety of titles depends on the regularity of judgments. In *Stein v. Good*, *supra*, the court say: "Uniformity and regularity in these proceedings * * * are of the utmost importance to the community, and we know of no better method of securing these desirable objects, than by saying to those who take such judgments, that they must at their peril see that the law has been complied with."

In *Gardner v. Bunn et al.*, *supra*, the court say: "The confession of judgment in vacation, is a statutory proceeding in derogation of the common law, and a judgment of that character will not be valid, unless there is a strict compliance with the law under which it may be authorized."

In Wisconsin, the Supreme Court of that State has held confessions of judgment under power contained in the note after the running of the statute, void. *Waldron v. Manson*, 23 Wis. 393; *Brown v. Parker*, 28 Wis. 22.

Seeing no error in the record, the judgment and order of the court below is affirmed. Order and judgment affirmed.

CARTWRIGHT, J., dissents.

Edward H. Nevitt v. Charles H. Woodburn, Administrator de bonis non of the Estate of George W. Woodburn.

1. DECREES—*May be Read in Connection with Others in the Same Suit.*—Where a decree read by itself is indefinite, it may be read in connection with former decrees in the same suit, in order to give it effect,

Nevitt v. Woodburn.

2. **DEMAND—Suits upon Executor's Bond.**—In a proceeding under Sec. 115, Chap. 3, R. S., entitled "Administration of Estates," against a defaulting executor, it is necessary to aver and prove a demand, but it is not necessary to do so, when proceeding under section 39, where an administrator sues a former executor or administrator for effects of the estate, withheld or wasted, embezzled or misapplied.

3. **RES ADJUDICATA—Settlement of Executor's Accounts, Binding upon Sureties.**—Where a person becomes bound to answer the default of an executor, and the question of his liability has been settled by proceedings in the courts having jurisdiction, resulting in an order for his removal and a decree finding the amount of his indebtedness to the estate, such matters are *res adjudicata*, and can not again be investigated in a suit upon the bond.

4. **STATUTE OF LIMITATIONS—Suits on Executor's Bonds—Adjudication of Executor's Accounts.**—Where an adjudication of the amount due an estate from an executor is confined to the acts for which a surety has become responsible and is made during the period of the executorship and the time when the surety obligates himself by his bond to indemnify the estate, it is not material when the adjudication is made, provided it was not then barred by the statute of limitations.

Memorandum.—Action of debt. In the Circuit Court of Whiteside County; the Hon. JOHN D. CRABTREE, Judge, presiding. Declaration on an executor's bond; the pleas are stated in the opinion of the court; trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 13, 1894.

STATEMENT OF THE CASE.

On the 3d of October, 1872, appellant became surety upon the bond of one Peter Ege, who was made executor of the last will of George W. Woodburn and qualified as such. The bond was in the usual statutory form.

After Ege had been acting as executor several years certain proceedings were had in the County and Circuit Courts of Whiteside County, which resulted in his removal by an order of the County Court and a decree of the Circuit Court finding him to be indebted to the estate in the sum of \$8,604.52, and ordering him to pay the amount to Wm. A. Sanborn, a person who had been appointed a receiver of the assets of the estate. The decree was reviewed in the Appellate and Supreme Courts on a writ of error and was reversed with directions. 123 Ill. 615.

On the 14th of May, 1888, on the remanding order from the Supreme Court the Circuit Court corrected the decree before them rendered and found that there was then due to the estate from Ege the sum of \$1,841.

Appellee was appointed administrator *de bonis non* in 1893, and instituted this suit on Ege's bond for the purpose of recovering the sum found due by the corrected decree and entered on the same. Service was obtained upon appellant only. Appellant filed pleas of *non est factum*, *nil tiel* record, *nil debet*, statute of limitations, denial of appellee's appointment, and a plea setting up that Ege, in addition to assuming the duties of executor, undertook to execute as a trustee, a certain power contained in the will with reference to the sale of lands of the deceased and that the sum sued for in the declaration mentioned was the proceeds of sales of lands made by him as trustee, for which he, Nevitt, was not surety. Replications were filed and a trial had by a jury, resulting in a verdict for appellee. Upon the trial appellee introduced the bond, orders of the County Court appointing Ege as executor, removing him, appointing appellee administrator *de bonis non*, the decree of the Circuit Court entered on the remanding order of the Supreme Court, and the former decree. The decrees were admitted over the objection of appellant.

After the proofs in support of appellee's case were all in, appellant moved to exclude it and direct a verdict for him, but the court overruled the motion. Appellant then offered to show, in proof of his sixth plea, that the \$1,841 did not come into the hands of Ege by virtue of his office as executor, but was derived entirely from the avails of the sale of the real estate sold by him as trustee under the power in the will; but the court refused to allow such proof to go to the jury.

Judgment was rendered in favor of appellee and against appellant for \$7,000 debt, and \$2,412 damages, from which appellant prosecutes this appeal.

JARVIS DINSMOOR, attorney for appellant.

JOHN G. MANAHAN, attorney for appellee.

MR. JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

The facts are undisputed that Ege was appointed executor of the estate of George W. Woodburn; that appellant became surety on his bond; that Ege was found in default to the amount of \$1,841; that no part of that sum has ever been paid; that Ege has been removed, and that appellee was appointed administrator *de bonis non*.

Numerous contentions, several of them extremely technical, are advanced by appellant. It is first insisted that the decree of the Circuit Court rendered in 1888, after the remanding order of the Supreme Court, does not bind appellant because the finding was not against Ege as executor. Read by itself, the decree of 1888 does not find against Ege as executor, but plainly has that effect when read in connection with the former decree. It was proper to read them together. The latter is upon the same subject-matter as the former and is its successor.

Appellant makes the point that the declaration does not aver, nor does the evidence show that Ege was ordered to pay to appellee, administrator *de bonis non*. It was not necessary to so aver or make such proof. There was not an administrator *de bonis non* at the time the decrees were rendered.

The failure to aver an order upon Ege to pay over the amount found due, and the failure to aver that a demand was made upon Ege or appellant to pay, were the points on which appellant based a motion in arrest of judgment. He urges those points vigorously in this court. The first point we have expressed ourselves upon. In proceeding under Sec. 115, Ch. 3, R. S., entitled "Administration," against a defaulting executor or administrator, it is necessary to aver and prove a demand. It is not necessary to do so, however, when proceeding under section 39 of that chapter, which reads as follows:

"Sec. 39. In all cases where any such executor or administrator shall have his letters revoked, he shall be liable

on his bond to such subsequent administrator or to any person aggrieved for any mismanagement of the estate committed to his care; and the subsequent administrator may have and maintain actions against such former executor or administrator for all such goods, chattels, debts and credits as shall come to his possession and which are withheld or have been wasted, embezzled or misapplied, and no satisfaction made for the same."

This suit was instituted under that section. Appellee's declaration, and the proofs offered by him, were sufficient to support a recovery.

The chief contention of appellant arises upon the alleged error of the Circuit Court in refusing to allow proofs under his sixth plea, showing that the money did not come to the hands of Ege as executor, but by virtue of his office as trustee, executing a power in the will to sell land. The elaborate argument of appellant's counsel upon this contention is in the teeth of the doctrine of *res adjudicata*. Appellant became bound to answer the default of Ege as executor, and the question of his liability was conclusively settled in the decree against Ege. It could not be again investigated in a suit upon the bond. When considered in connection with the former decree, which we have held it was proper to do, the decree found appellant's principal in default to the amount of \$1,841. To allow the proof offered, would permit him to deny the finding of a decree in full force against him.

It is insisted, also, that as Ege was discharged as executor "October 13, 1882, any judgment rendered against Ege thereafter would not conclude, in any way, the surety," and that appellant is, therefore, not bound by the decree of 1888. The finding was concerning the defaults of Ege during the period of his executorship and during the time when appellant obligated himself by the bond to indemnify the estate. So long as the adjudication is confined to those acts of the principal for which the surety has become responsible, it is immaterial when it is had, provided it is not barred by the statute of limitation.

Appellant contends that as the decree in which Ege was

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found indebted to the estate in the sum of \$8,604.52 as executor was rendered "October 9," 1882, from which he did not formally appeal, and as this suit was not commenced until April 28, 1893, appellee is barred by the statute of limitations. There were other parties affected by that decree, and it was immaterial who prosecuted the appeal. The proceeding was *lis pendens*. The declaration counts on the amount found due in 1888, and the decree of 1882 was offered in evidence as explanatory of the first decree and really as a part of it.

The court took the same view in giving an instruction with reference to the statute of limitations, of which appellant complained. The instruction is right. Decree affirmed.

Wenona Zinc Company v. Elizabeth F. Dunham.

1. **DAMAGES—From Noxious Gases—Measure of.**—In an action for damages to a dwelling by reason of the location of zinc works, it is proper for witnesses to state the value of the premises, both before and after such location, and then to connect the depreciation with the location and operation of the works.

2. **SAME—Suits for Entire and Accruing Damages.**—Where premises are damaged by noxious gases emitted from zinc works, and an action is brought by the owner, in which entire damages are recovered for the permanent injury, and both parties try the suit upon the assumption that such damages may be so recovered, the defendant can not afterward object and insist upon the claim that successive suits must be brought for accruing damages.

Memorandum.—Action for damages to premises from noxious gases. In the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding. Declaration in case; plea, not guilty; trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 13, 1894.

APPELLANT'S BRIEF, WINSLOW EVANS AND STEVENS & HORTON, ATTORNEYS.

It is not every trifling impregnation of the atmosphere that creates a nuisance. There are many uses of property,

for the ordinary purposes of life, that produce more or less of discomfort, and where these are necessary incidents of the ordinary use of property, and are only occasional, and produce no real or substantial damage, they must be borne with, as results that can not reasonably be avoided. The damage must be real, not fanciful, not a mere annoyance to a person of fastidious tastes and habits, but such sensible and real damage as a sensible person, if subjected to it, would find injurious to him. Wood on Nuisances, Sec. 532.

Before a trade or business can be declared to be a nuisance *per se*, it must be made to appear that it necessarily works injury, discomfort or annoyance to the property or persons of citizens generally who may be so circumstanced as to come within its influence. It is not enough that only one person, and that one the complainant, alleges discomfort. Westcott v. Middleton, 27 Am. L. Reg. 440.

The question of nuisance or no nuisance depends upon the effect of noise upon people generally, and not upon those, on the one hand, who are peculiarly susceptible to it, or those, on the other, who, by long experience, have learned to endure it without inconvenience. Rogers v. Elliott, 146 Mass. 349.

The injury must be something more than a fanciful inconvenience. The question of mere delicacy or fastidious tastes arising from delicate and dainty habits of life would not be a clear and plain inconvenience with ordinary comforts and enjoyments. Walters v. Selfe, 4 Eng. L. & Eq. 22; Cooper v. Randall et al., 53 Ill. 24; 59 Ill. 317; St. Helen's Smelting Co. v. Tipping, 11 H. L. Cas. 642.

If a private structure or other works on land is a cause of a nuisance to the plaintiff, the law can not regard it as permanent, no matter with what intention it was built, and the damages, therefore, can be recovered only to the date of action. 1 Sedgwick on Damages, Sec. 93.

In such cases it is improper to permit evidence to be introduced on the question of the depreciation in value of the plaintiff's property. The right of recovery is confined solely to the injury of the property and the use of it up to the time of the beginning of the suit. If the operation of the

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works is a nuisance, the law will not presume the continuance of a wrong, nor allow a license to continue such wrong, and therefore can not allow any damage for the depreciation in the value of the property. Schlitz Brewing Co. v. Compton, 142 Ill. 511; Cooper v. Randall, 59 Ill. 317.

APPELLEE'S BRIEF, CLARENCE GRIGGS AND MAYO & WIDMER,
ATTORNEYS.

Appellee contended that the theory upon which the case was tried, whether erroneous or not, is not unsupported by authorities.

In Ottawa Gas Light & Coke Co. v. Graham, 28 Ill. 73, which was an action on the case to recover for injuries to Graham's property, occasioned by the gas works, the court, in passing upon what might be recovered in such a case, said: "Another means in arriving at the damages would be to ascertain the depreciation of the value of the property by reason of the erection of the gas works, to ascertain how much less the property would sell for in consequence of the erection than if it had not been made. And in ascertaining that fact, all the circumstances which might show a depreciation in value should be considered. If the property would sell for the same amount, independent of a rise in similar property, then there would be no loss; but if it would not, then the difference would be the damages sustained." See also, I. C. R. R. Co. v. Grabill, 50 Ill. 241.

In Chi. & Pac. R. R. Co. v. Stein, 75 Ill. 41, where the action was to recover damages caused by a bridge built by the R. R. Co. near the plaintiff's dock, the court said: "We see no reason why it would not have been proper for appellees to have proved the value of their property before the erection of the bridge, and the value after the building of the bridge. In other words, it would have been proper to have shown how much less the property would sell for in consequence of the erection of the bridge than if it had not been built." See, also, C. & A. R. R. Co. v. Maher, 91 Ill. 242.

In Decatur Gas Light Co. v. Howell, 92 Ill. 19, the court

said, the Graham case "is authority for the position that it was competent to recover (in a former suit between the parties) for the difference in value of the property, owing to the erection of gas or other offensive structures in its vicinity," and held that such recovery was a complete bar to the second suit, in which the only basis of recovery was a continuance of the nuisance.

It has frequently been held that in an action brought for deterioration in the value of real estate from a nuisance of a permanent character, all damages for past and future injury to the property may be recovered, and that one recovery in such action will be a bar to all future actions for the same cause. *C. & E. I. R. R. Co. v. Loeb*, 118 Ill. p. 210; *Cooper v. Randall*, 59 Ill. 321; *C., B. & Q. R. R. Co. v. Schaffer*, 124 Ill. 112; *E. I. R. R. Co. v. Loeb*, 118 Ill. 208.

MR. JUSTICE CARTWRIGHT DELIVERED THE OPINION OF THE COURT.

Appellee brought this suit against appellant to recover damages resulting to herself and her property from the location and operation of zinc works near her home, and she recovered \$750.

Appellant complains that on the trial the injury to plaintiff's property was treated as permanent, and she was allowed to prove the depreciation in the value of the property; that the court excluded proper evidence offered by defendant, and that the verdict is against the weight of the evidence.

In two counts of the declaration, damages of the kind now objected to, were charged. The damages proved, resulted from gases generated in the reduction of zinc ore which contains about forty per cent of sulphur. The evidence for defendant was, that it was necessary to burn out the sulphur, and create the gases which went up the chimney and passed off into the atmosphere. The injury was a natural and necessary attendant of the works, and so far as appears could not be avoided by any change in the operation of them. In *Ottawa Gas Light and Coke Co. v. Graham*, 28 Ill. 73, and *Decatur Gas Light & Coke Co. v. Howell*, 92

Ill. 19, it was held proper to recover, in one suit, for permanent damages by the depreciation in value of property on account of the location of gas works in the vicinity, and the damages suffered from such cause were similar to and not more permanent in character than in this case. But whatever the correct rule may be, appellant can not now object that all the damages were recovered in this action, and insist upon the claim that successive suits must be brought for accruing damage, because both parties tried the case upon the assumption that all the damages might be so recovered. Both offered evidence of the value of the property before the location of the works and at the commencement of the suit, and of the depreciation in value, and both asked instructions on that subject. No objection to evidence was made on that ground, and the parties having treated the injury as permanent and all damages as recoverable in this action, appellant can not now be permitted to change its ground, because dissatisfied with the result of trying the case on that basis. It is sought to bring under this head two objections made to questions, but the objections were plainly made for other reasons, and will not suffice to raise the point as to the entire damages being recovered.

One of these questions is said to be open to another objection—as calling for a conclusion. The witness had given an opinion as to the value of the premises before the location of the works and at the commencement of the suit, showing great depreciation, and was then asked what caused the depreciation. It was manifestly necessary and proper to connect the depreciation with the location and operation of the zinc works and the poisonous gases as the cause, and the method adopted was proper, and was approved in *K. & S. R. R. Co. v. Horan*, 131 Ill. 288.

Dr. W. H. Frazer was examined as a witness for defendant, and testified that he had practiced about zinc works in La Salle and Peru, but the court refused to allow him to answer a question whether the smoke and fumes from those works had any effect on the health of his patients. It is insisted that the court was wrong, but it is immaterial

whether that is so or not, since the witness testified that he never knew a case of ill-health that was attributed to the fumes or smoke from zinc works, and nothing more could have been gained by an answer to the question. There was no ground for alleging error on that account. *Bull v. Griswold*, 19 Ill. 631.

Plaintiff owned about five acres, occupied as a home at the time of the erection of the zinc works, well set in fruit trees of various kinds and small fruit. In reducing the zinc ore large quantities of sulphurous acid gas and carbonic acid gas were generated and passed out of the chimney, and being heavier than the atmosphere, in ordinary conditions, sank upon the adjacent premises including the property of plaintiff. The evidence was that carbonic acid gas was a deadly poison, and that sulphurous acid gas was a highly irritant poison of foul and pungent odor destructive alike to all forms of animal and vegetable life, and the only question raised by the evidence was whether the proportion of these gases in the atmosphere would be great enough to make them effective. The evidence amply justified the jury in concluding that they were effective in this case in killing the trees, small fruits and vegetation of all kinds, making the cistern water unfit for use, and seriously affecting the health and comfort of plaintiff. Before the location of the works she was a healthy woman, doing all the work for a family of seven, and injurious consequences manifested themselves when the works were put in operation, and continued while they were operated. When the wind changed so as to blow the gases away from her premises her condition improved, and she became worse again upon their return. The evidence sufficiently connected her ill-health with the gases as the cause. We think the verdict is in accordance with the evidence and the judgment will be affirmed.

Clark v. Gibbons.

**Ellen F. Clark and Willard D. Clark (Impleaded with
Shelby A. Kingman), v. Eugene Gibbons,
Administrator pro tem. of the Estate
of Matthew Kingman.**

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1. **WITNESSES—Competency Unaffected by Moral Interests.**—The fact that a witness has a moral interest in the controversy does not bring him within the statutory inhibition against interested parties testifying when the claim is defended against by an administrator. The interest must be a pecuniary one. A moral interest may affect the credibility of a witness but not his competency.

2. **SAME—Evidence to be Taken Most Strongly Against.**—Where a witness testified that he gathered from a conversation he had with his father that he intended to arrange certain matters in his will, but he did not say so in so many words, *it was held* that the evidence should be taken most strongly against the witness as to what his father intended to do in the matter.

Memorandum.—Petition in probate for the surrender of certain notes, etc. In the Circuit Court of Peoria County, on appeal from the Probate Court of said county; the Hon. NICHOLAS E. WORTHINGTON, Judge, presiding. Hearing and decree for petitioners; appeal. Heard in this court at the May term, 1894. Reversed and remanded. Opinion filed December 13, 1894.

**APPELLANTS' BRIEF, WM. T. IRWIN, WM. S. BRACKETT AND
W. I. SLEMMONS, ATTORNEYS.**

Under Sec. 2, Chap. 51, Rev. Stat. of Illinois, on "Evidence," a party to a civil action, or a person directly interested in the event or result thereof, is not a competent witness where the adverse party sues or defends as executor, administrator, heir, legatee, or devisee of any deceased person (except in certain specified instances not herein in question). *Whitmer v. Rucker*, 71 Ill. 410.

Persons having claims similar to the one in controversy and depending on the same facts are incompetent witnesses. *Pride v. Peters*, 1 Root (Conn.) 331.

A witness whose debt would be extinguished by a recovery in the suit is not a competent witness for the plaintiff. *Richardson v. Bartlett*, 2 B. Mon. (Ky.) 428; see, also, *Springdale v. Smith*, 33 Ill. 252.

JOHN S. STEVENS and J. A. CAMERON, attorneys for appellee.

MR. PRESIDING JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This was a petition filed by Shelby A. Kingman in the Probate Court against appellee, administrator *pro tem.* of Matthew Kingman, deceased, praying for an order of court to compel the administrator to surrender to said Shelby A. Kingman a certain promissory note given by him to his father, Matthew Kingman, deceased, in his lifetime, dated January 1, 1876, for \$1,543, to be accounted for in the settlement of the estate. The cause was tried by the Probate Court and the prayer of the petition denied, and the petitioner appealed to the Circuit Court. The appearance of appellant's two heirs at law of Matthew Kingman, deceased, was entered in the Circuit Court and they were given leave to defend. On the trial, the Circuit Court ordered the note delivered to the petitioner, and from such order this appeal is taken.

The brother of the petitioner, M. F. Kingman, having a similar claim to the one in controversy against deceased's estate, and depending on the petitioner herein to support it by his testimony, was the only witness to support it, and testified that he and his brother had a conversation with their father in his lifetime, in 1890, to the effect that in consideration of certain services rendered during a series of years in Iowa, in loaning their father's money, he promised them that he would arrange in his will, as witness inferred, that the note should not come against them; that he did not intend the note should ever come up against them, the petitioner and the witness. The witness testified that he and the petitioner had done some of the work, about three fourths, for their father jointly, they were claiming for at the time of the supposed promise. The deceased said he would fix the matter (of the notes) when the time came. The claim the two brothers had against the father was one for services in loaning money in Iowa.

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They never kept any account or charge for their services, but from time to time told their father that they ought to have some pay and he said he would pay them. This conversation took place in 1890, and had reference to services running many years back.

It is objected that the witness had no right to testify, on account of the statutory inhibition against interested parties testifying, where the claim is defended against as administrator. We are of the opinion that the witness had no pecuniary interest in the result of the litigation. His interest was a moral one, depending on his expectation of his brother's support in his own claim, and moral bearing the establishment of the petitioner's claim would have on his own.

These considerations would only go to the witness' credibility, not to his competency. According to the testimony of the witness on cross-examination, he gathered from the conversation with his father that he intended to fix the matter in his will, but his father did not say so in so many words. We think the evidence should be taken most strongly against the witness' claim as to what his father agreed to do with him and petitioner in relation to the notes in question, and where the claim rests on inferences it should be decided against petitioner. We think all the evidence and circumstances considered, the petitioner fails to make out a case of absolute agreement on the part of the deceased to satisfy the notes in any way, by will or otherwise. It appears to us that if such had been intended the deceased would have surrendered the notes. But by keeping the notes and saying what he did the deceased simply meant to say he would do what was right in making his will, and that when he came to consider the question of making his will he did not think the petitioner and witness were entitled to have the notes canceled, and he failed to make a will, or failed to provide for the notes. There was no amount of services of which any account was given and no amount was stated. As before said, it appears to us that deceased intended to keep the matter in his own hands, to do as he deemed right

and just in his testamentary disposition of his property, if he made any, and the inferences, in consideration that deceased can not speak, should be more strongly drawn against the petitioner and the witness.

The order of the Circuit Court ordering the surrender of the note in question to the petitioner, Shelby A. Kingman, is reversed and the cause remanded.

Ellen F. Clark and Willard D. Clark, Impleaded with M. F. Kingman, v. Shelby A. Kingman, Administrator of the Estate of Matthew Kingman.

1. **BURDEN OF PROOF—*Claims Against Deceased Persons.***—Where a father held a note against his son, and after his death the son filed a petition to have the note surrendered to him upon a promise of his father in his lifetime to do so, the burden is upon the son to show the promise of the father.

Memorandum.—Appeal from the Circuit Court of Peoria County; the Hon. NICHOLAS E. WORTHINGTON, Judge, presiding. Heard in that court on appeal from the Probate Court of said county. Heard in this court at the May term, 1894. Reversed and remanded. Opinion filed December 18, 1894.

WM. T. IRWIN, WM. S. BRACKETT and W. I. SLEMMONS,
attorneys for appellants.

JOHN S. STEVENS and J. A. CAMERON, attorneys for appellee.

MR. PRESIDING JUSTICE LACEY DELIVERED THE OPINION OF
THE COURT.

This is similar to the preceding case, with M. F. Kingman as petitioner, for the surrender of two certain promissory notes given by petitioner to Matthew Kingman, deceased, his father, in his lifetime, one for \$500, dated August 16, 1880, and one in June, 1882, for \$1,000, both of which, together with six per cent interest, were to be accounted for

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by petitioner in the settlement of said Matthew Kingman's estate.

The petition alleges that petitioner, many years prior to 1890, performed services for deceased in the State of Iowa at deceased's request; that no settlement for services was made till February 12, 1890, when deceased promised that the two papers or receipts were to be applied in payment of petitioner's claim, and deceased promised said papers should never come against him.

On appeal to the Circuit Court from the Probate Court, where the case was first tried, the Circuit Court entered an order that the said two notes or papers described in the petition be surrendered to petitioner, and that the administrator amend his inventory in the Probate Court, so as to exclude therefrom, said notes.

The case was tried, and it was almost an exact counterpart of the claim of Shelby A. Kingman against the estate, appealed to this court, of Ellen F. Clark et al. v. Eugene Gibbons, ext. *pro tem.* of the same estate, and decided by this court, reversing the order of the Circuit Court, and in which we filed an opinion, giving our reasons at large for reversing the order. (See preceding case.) The claim of the petitioner herein was sustained only by the evidence above of Shelby A. Kingman, administrator of deceased, and brother of petitioner, and is in all substantial particulars the same as that of M. F. Kingman, petitioner herein, in his case referred to in the opinion, only in this case the supposed promise of satisfaction of the notes by deceased, referred to the notes in question here.

For the same reasons given in the opinion in the case referred to, and which we adopt and apply to this case, we are of the opinion said claim of petitioner is not made out by the evidence.

There was no absolute promise of deceased to satisfy petitioner's notes. The matter was left undetermined for deceased to do as he thought right in his will, or otherwise, by petitioner in reference to the notes.

The order of the Circuit Court is therefore reversed and the cause remanded.

Amos Brayton v. E. E. Harding.

1. ESTOPPEL—*Where it Applies—Inducements by the Conduct of Another.*—The doctrine of estoppel will apply where the acts of a party against whom it is applied, induce the conduct of an innocent party and produce a fraudulent result. It is not essential that fraud be shown.

Memorandum.—Replevin. Appeal from the County Court of Iroquois County; the Hon. MOSES H. EVANS, Judge, presiding. Heard in this court at the May term, 1894. Reversed and remanded. Opinion filed December 13, 1894.

STATEMENT OF THE CASE.

On the 29th of July, 1891, appellee, the owner of a harness shop at Askum, Ill., sold his stock of tools and goods to Frank Higgins. The contract of sale was in writing, and provided for a cash payment of \$50, \$300 to be paid September 1, 1891, \$200 to be paid January 1, 1892, and the balance, when ascertained by invoice, to be paid July 1, 1892. It was further provided that the goods and tools should remain the property of appellee until paid for, and that appellee should have the power to take possession of them on the failure of Higgins to make payment as specified by the contract.

The stock of goods and tools invoiced \$1,029.87, the cash payment of \$50 was made, notes were executed for the deferred payments and Higgins took charge of the business. Within a few days afterward Higgins wrote to Andrew Cowan & Co., a wholesale firm dealing in leather at Louisville, Ky., on one of appellee's old letter heads, ordering a small amount of material. Cowan & Co. declined to fill the order then, but inclosed it with a letter of inquiry to appellee.

Appellee replied on the 17th of August, 1891, as follows: "Yours of the 14th at hand. Replying, I would say I sold out to Frank Higgins a short time ago.

Think you will be safe in sending him the order.

Resp'y,

E. E. HARDING."

Brayton v. Harding.

On the strength of this information the order was filled and goods sold to Higgins amounting to \$79. They were not paid for, and on the 2d of January, 1892, suit was commenced against Higgins resulting in a judgment in favor of Cowan & Co., for \$79 and costs, January 16, 1892. Execution was sworn out on the same day and placed in the hands of appellant as constable, who levied upon the stock of goods, then in the possession of appellee. Appellee took possession of the goods on the 6th of January, 1892, after suit was commenced by Cowan & Co. There was then due the \$200 note and a small balance on the \$300 note. Immediately after the levy of the execution appellee began this replevin suit, claiming under his written contract. Among other pleas filed was one setting up that Harding was estopped as against the execution from claiming the goods under his contract by his failure to disclose to Cowan & Co. the nature of his contract at the time he replied to the letter of August 14, 1891. A trial resulted in a verdict and judgment in favor of the plaintiff (appellee).

APPELLANT'S BRIEF, S. S. CONE AND KAY & KAY, ATTORNEYS.

On the question of estoppel appellant cited the following authorities: Edwards v. McCurdy, 13 Ill. 496; Kinneer v. Watson, 24 Ill. 591; Ketchum v. Watson, 24 Ill. 592; Hill v. Blackwelder, 113 Ill. 283; Kinneer v. Mackey, 85 Ill. 96; Chandler v. White, 84 Ill. 435; Flower v. Elwood, 66 Ill. 438; Heffner v. Vandolah, 57 Ill. 520; Nettler v. Croft, 39 Ill. App. 193; Robbins v. Moore, 129 Ill. 30; Mul-laney v. Duffy, 145 Ill. 559.

CHARLES W. RAYMOND, attorney for appellee.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

There is no controversy over the facts in this case, and about the only serious question involved, is whether appellee is estopped from claiming the goods as against the execution by reason of his letter to Cowan & Co., and his failure to

disclose the nature of his contract with Higgins. By the terms of that contract the sale to Higgins was only conditional, dependent upon Higgins making the payments specified. It was specifically agreed that ownership in the property should remain in appellee until paid for, and he was given the right to take immediate possession of the entire stock on failure of Higgins to pay at the times specified. The latter contained no intimation that the sale was other than an absolute and unconditional one. It was the duty of appellee under the circumstances to disclose the nature of his claim upon the property.

It is immaterial whether appellee intended a fraud upon Cowan & Co. at the time he wrote the letter. If the effect of the letter was to mislead Cowan & Co. to their injury, and such was the reasonable and probable consequence of it, it was sufficient to estop him.

The doctrine of estoppel will apply where the acts of a party against whom it is applied induce the conduct of an innocent party and produce a fraudulent result. It is not essential that intentional fraud be shown. *Flower v. Elwood*, 66 Ill. 438; *Kinnear v. Mackey*, 85 Ill. 96; *Robbins v. Moore*, 129 Ill. 30.

The judgment will be reversed for the reason that appellee is estopped from claiming the property as against the execution held by appellant, and the cause remanded.

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Elgin City Railway Company v. Addie M. Wilson.

1. *NEGLIGENCE—Rates of Speed in Dangerous Places.*—It is negligence in an electric car company to run its cars at a high rate of speed in dangerous places.

2. *PASSENGERS FOR HIRE—Right to be Safely Transported.*—A passenger for hire is entitled to be safely transported, and where the car in which such passenger is riding is overturned, the presumption is that it resulted from a defective condition of the track, or the mismanagement of the car, or both, and the burden is upon the company to show that the accident resulted from a cause for which it is not responsible.

Elgin City Ry. Co. v. Wilson.

3. *TRIALS—Improper Conduct of Counsel—Exceptions to.*—If it is desired to assign error upon the conduct of counsel in the trial of a cause, such conduct must be excepted to at the time, and preserved in a bill of exceptions.

4. *SAME—Improper Conduct of Counsel.*—A statement by counsel in his closing argument, that the law relating to special findings was procured by the efforts of corporations and lobbyists in the legislature, is improper.

5. *INSTRUCTIONS—Oral, Prohibited.*—When the court, after reading the special interrogatories to the jury, told them orally that their answers to them should be consistent with their general verdict, it was held to be erroneous, and a violation of the statute prohibiting oral instructions.

6. *SAME—Agreement for Oral Instructions—Application of.*—An agreement that the court may instruct orally as to the general verdict, does not authorize the court, after reading special interrogatories to the jury, to instruct them orally as to the nature of their answers.

Memorandum.—Action for personal injuries. In the Circuit Court of Kane County; the Hon. HENRY B. WILLIS, Judge, presiding. Declaration in case; plea, not guilty; trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1894. Reversed and remanded. Opinion filed December 13, 1894.

A. H. BARRY, attorney for appellant; R. N. BOTSFORD and D. B. SHERWOOD, of counsel.

J. A. RUSSELL and IRWIN & EGAN, attorneys for appellee.

MR. JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This suit was brought to recover for injuries sustained by appellee while a passenger on an electric street car which, while moving at a rapid rate of speed upon a down grade and around a curve, left the track and was precipitated over a high embankment. There was a recovery for \$8,000.

Appellant brings the record here by appeal and contends for a reversal of the judgment because the verdict is not supported by the evidence; because the court improperly allowed certain testimony introduced by the plaintiff to go to the jury, and refused certain testimony proper for the defendant; because of improper remarks by counsel for the plaintiff in his closing speech to the jury; because the court

instructed the jury orally, and because the damages awarded are excessive.

It was claimed by the plaintiff in her declaration and upon the trial that the accident was caused by the spreading of the rails, want of elevation of the outside rail and the rapid speed of the car. She introduced evidence tending to prove such causes. The defendant introduced contrary proof upon those points, and sought to establish that the accident was due to a stone getting upon one of the rails and throwing the car from the track, for which it was not responsible.

About the place where the accident occurred there was a change in the kind of rail used, the south part of the track being "T" rail and the north part flat rail. The car in which the plaintiff took passage was going north. Witnesses for her swore to finding marks on the "T" rail south of the junction, showing that the car left on that rail and ran along on top of the rail some distance and went over the embankment sixty or seventy feet beyond. Witnesses for the defendant swore to finding a mark on the flat rail north of the junction, showing that the car left on that rail. They also swore to finding the remains of a small crushed stone, indicating that the accident was caused by the car wheel striking it. Witnesses for plaintiff swore that the outside rail was not elevated, and that the rails were farther apart than the standard gauge used.

Defendant's witnesses deny this, and it is claimed they are more reliable, because they measured with a standard iron gauge, while the plaintiff's witnesses measured with a tape line and estimated the elevation from the eye. The measurements and elevations taken by defendant's witnesses were taken just before the trial, and there was some conflict as to whether there had been any changes made after the accident more than merely "shimming" up the rail a little with wedges. Notwithstanding the conflict it is made clear that the part of the track where the accident occurred was a dangerous place and required great care on the part of employes operating cars. The evidence satisfies us that the car was moving at a reckless rate of speed at the time it

left the track. Some of the plaintiff's witnesses fixed the rate at twenty miles per hour, while the conductor and motorneer fixed it at six. Of course, it is difficult to estimate with accuracy the speed of a rapidly moving electric car, but it does not seem there could be an honest difference of fourteen miles per hour. The evidence is uncontradicted that the car was rocking and pitching at a fearful rate, indicating that its speed was rapid.

The plaintiff was without fault. She was a passenger for hire, entitled to be safely transported, and the presumption is that the overturning of the car resulted from the defective condition of the track or the mismanagement of the car, or both combined, and the *onus* was upon the company to show that the accident resulted from a cause for which it was not responsible. *P. C. & St. L. R. R. Co. v. Thompson*, 56 Ill. 138; *P. P. & J. R. R. Co. v. Reynolds*, 88 Ill. 418; *Eagle Packet Co. v. Defries*, 94 Ill. 598.

The jury were of the opinion that the accident was caused by the bad condition of the track coupled with the speed of the train.

The objection to certain rulings of the court on the admission of evidence are rather unimportant. It is difficult for us to see how the admission of that denied or the exclusion of that complained of could have altered the result.

The defendant submitted for special findings ten interrogatories, which were by counsel for plaintiff read to the jury, and commented on, he giving his idea as to how they should be answered. To the action of plaintiff's counsel in so doing the defendant objected, but the court overruled the objection and held that counsel had the right to read the interrogatories to the jury and explain to them his idea as to how they should be decided.

This, it is claimed, was reversible error. What was said by counsel does not appear in the bill of exceptions, and we can not, therefore, determine whether the remarks were harmful. Such a practice, however, should not receive the countenance of the court, because of the abuses which it would evidently lead to.

The statement made by counsel in his closing speech that the law relating to special findings was procured by the efforts of corporations and corporation lobbyists in the legislature was entirely improper. It was met, however, by a prompt rebuke from the court.

When the court read the interrogatories to the jury he told them orally that their answers to them should be consistent with their general verdict. To such oral statement defendant excepted. The giving of such oral direction was erroneous. Oral instructions to the jury are inhibited by statute. The agreement for the court to instruct orally was confined to the form of the general verdict, as appears from the bill of exceptions.

We do not think the direction would have been correct, even if embodied in the form of a written instruction.

The judgment should be reversed and the cause remanded.

56	368
93	*585
56	368
99	*312

William McKowan v. Edward F. Harmon.

1. **FENCES—Rule at Common Law as to Stock.**—By the common law adjoining owners of lands were bound, each to keep his stock on his own land, and neither was bound to fence against the stock of the other.

2. **TRESPASS BY ANIMALS—Division Fences.**—In an action of trespass for damage done by animals, the plaintiff is entitled to recover under the common law rule, unless the defendant is able to show that the rights and obligations of the parties have been changed by an allotment of the division fence, and that the animals entered upon his premises through that part of the fence allotted to plaintiff to keep in repair.

3. **APPELLATE COURT PRACTICE—Where the Abstract Does Not Contain all the Instructions.**—Where the abstract does not contain all the instructions, the court is not bound to take notice of objections made to such as it does contain.

Memorandum.—Trespass. In the Circuit Court of Peoria County, on appeal from a justice of the peace; the Hon. NICHOLAS E. WORTHINGTON, Judge, presiding. Trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 13, 1894.

ARTHUR KEITHLEY, attorney for appellant.

L. F. MEEK and R. J. COONEY, attorneys for appellee.

MR. JUSTICE CARTWRIGHT DELIVERED THE OPINION OF THE COURT.

This suit was brought by appellee before a justice of the peace to recover damages occasioned by appellant's hogs to a field of growing corn. Appellee recovered before the justice, and appellant having taken an appeal to the Circuit Court the case was twice tried in that court, and on each occasion the jury found in favor of appellee. The last time the verdict was for \$40, and judgment was entered for that amount and costs.

Both parties were tenants and occupied adjoining farms which were separated by a hedge fence 160 rods in length. The defendant turned his hogs into a field of oat stubble next to the corn, where the north half of the hedge fence divided the farms, and they went through that part of the hedge into plaintiff's field and did the damage. Six or seven rods of the hedge fence in that part had been burned out for about a year, and the fence had not been repaired and was not fit to turn stock. The defense made to plaintiff's claim was that the hedge fence was a statutory division fence, and that the north half of the fence being the part through which defendant's hogs passed, had been allotted to the plaintiff as his proportion of the fence, and being bound to maintain it he could not recover damage due to its insufficiency. By the common law each of the parties was bound to keep his stock on his own land, and neither was bound to fence against the stock of the other. The plaintiff was entitled to recover by virtue of that rule unless defendant should be able to show that the rights and obligations of the parties had been changed by a division of the hedge fence and an allotment of the north part to plaintiff. *McCormick v. Tate*, 20 Ill. 334; *D'Arcy v. Miller*, 86 Ill. 102.

There never was any express agreement between the adjoining proprietors for a division of the fence between them. It was an old hedge, said to have been old in 1875, and the

evidence relied upon to prove a division, was that since that year such trimming and work as had been done on the hedge had been done by the owner of the premises occupied by plaintiff or his tenants on the north half, and by the owner of the premises occupied by defendant or his tenants on the south half. The parties to the suit had occupied the farms about five years, and had trimmed and raked the hedge in that way twice during that time. It seems that no part of the fence had very much care, and none of it was very good. The part that was burned had been gone about a year, and nothing was said or done about repair. While we think that the facts shown might have justified an inference on the part of the jury that the fence had been established as a division fence by acquiescence of the owners, yet the evidence is not so satisfactory and conclusive as to authorize us to say that the jury were clearly wrong in finding that there had been no division. There have been repeated trials, and we see no reason to expect a different result if another should be allowed.

It is contended that certain instructions given at the instance of plaintiff were erroneous, but if there is any valid objection to any of them, it is of a nature to be remedied by other proper instructions, and as the abstract does not contain all the instructions, we will not notice the objections made. Everything must be contained in the abstract which affects the questions raised.

There are some objections to rulings upon the admission of evidence, but we do not regard any of them as well taken. The judgment will be affirmed.

City of Sterling v. Charles E. Grove.

1. SPECIAL INTERROGATORIES—*Bill of Exceptions*.—If a party desires to assign error because the counsel for the opposite party submitted to the court, and the court gave to the jury, questions of fact to be found by them, without submitting such questions to him before the commencement of the arguments, he must except to the action of the court at the time, and preserve his exception in a bill of exceptions.

56	370
79	296
79	336
56	370
82	388
56	370
86	673

City of Sterling v. Grove.

2. **BILL OF EXCEPTIONS—*Must be Under Seal.***—There can be no legal bill of exceptions without a seal to the signature of the judge signing the bill, as required by the statute.

Memorandum.—Action for personal injuries. Appeal from the Circuit Court of Whiteside County; the Hon. JAMES SHAW, Judge, presiding. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 18, 1894.

H. C. WARD, attorney for appellant.

C. J. JOHNSON, attorney for appellee.

MR. PRESIDING JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This was an action on the case by appellee against appellant seeking to recover damages to his cellar and property caused by overflow of water by reason of negligence in the appellant in not building a proper retaining wall. The charge is that in preparing Third street for grading and paving, the city caused to be erected and built a certain wall along the north side of said street, and in front of and near to the lots and buildings so occupied by appellee, and in grading said street and building said retaining wall, did the work in such a negligent and careless and unskillful manner, as to cause the rain falling upon said street to flow from the street in large quantities into the basement of the building of said plaintiff, and thereby caused great damage to appellee's cellar, etc.

The cause was tried by a jury and resulted in a verdict in appellee's favor for \$242, on which judgment was rendered.

The appellant objects that appellee's counsel submitted to the court, and the court gave certain questions of fact to be found by the jury without submitting such questions to appellant's counsel before the commencement of the argument to the jury, as required by the statute, and the court refused to withdraw the question from the jury (*McMahon v. Sankey*, 133 Ill. 636), and that certain other instructions were erroneous.

On examination of the record we find no exceptions to

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such action of the court taken at the time, hence no objection can be raised here.

We further find from an examination of the record that there is no seal to the judge's name signed to the bill of exceptions as required by statute. There is no legal bill of exceptions in the record which this court can consider.

But if we should consider the evidence, as contained in the supposed bill of exceptions, we should find that the evidence contained therein supports the verdict.

The judgment of the court below is, therefore, affirmed.

56 372
158 333

City of Fulton v. Northern Illinois College.

1. MUNICIPAL CORPORATIONS—*Can Not Loan Money to Private Enterprises.*—A municipal corporation in this State has no power, in the absence of express authority, to donate or loan money to private enterprises.

2. ULTRA VIRES—*Application of the Rule Where the Contract has Been Performed.*—The rule that if a contract entered into by a corporation has been performed by either of the parties the other party can not set up as a defense for the breach of the contract that the corporation had no authority to enter into it, is to be confined to cases where there has been a performance as stated.

3. LIMITATIONS—*When to be Raised on Demurrer.*—The statute of limitations can be taken advantage of by demurrer when it appears on the face of the pleading that the period fixed by the statute has expired.

Memorandum.—Foreclosure. In the Circuit Court of Whiteside County; the Hon. JOHN D. CRABTREE, Judge, presiding. Decree or demurrer to bill; error by complainant. Heard in this court at the May term, 1894. Opinion filed December 13, 1894.

BRIEF FOR PLAINTIFF IN ERROR, C. C. McMAHON AND J. E. McPHERRAN, ATTORNEYS.

The doctrine seems to be that if a party have no other objection to interpose to the enforcement of a contract, of which it has received the benefit, than that the plaintiff is incompetent to sue, he should not be allowed to escape the

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liability on a contract simply *ultra vires*, except where the incompetency results from something subsequent to the execution of the contract, as the bankruptcy of the party. 1 Lawson's Rights and Remedies, 365; Bigelow on Estoppel, 424.

And for like reason a corporation sought to be charged will not be permitted to plead to an executed contract that it did not possess the power to make the contract, and thereby avoid its liability, where the contract is not expressly prohibited by a public statute or a private law. *Maher v. City of Chicago*, 38 Ill. 266.

The federal authorities hold even more strongly upon this question. "The doctrine of *ultra vires* when invoked for or against a corporation should not be allowed to prevail, where it would defeat the ends of justice or work a legal wrong." *San Antonio v. Mehaffy*, 96 U. S. 312; *Railway Co. v. McCarthy*, 96 U. S. 258.

BRIEF FOR DEFENDANTS IN ERROR, MCCOY BROTHERS,
ATTORNEYS.

Municipal corporations possess and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. *Cook County v. McCrea*, 93 Ill. 237; *Huesing v. City of Rock Island*, 128 Ill. 465; *Wheeler v. County of Wayne*, 132 Ill. 599; *Dillon, Mun. Corp.*, Sec. 89.

Powers not expressly granted to municipal corporations, or necessary to the execution of those so given, are in effect prohibited and unlawful, upon grounds of public policy. *Morawetz on Corp.*, Sec. 168; *McPherson v. Foster Bros.*, 43 Ia. 48; *People et al. v. Chicago Gas Trust Co.*, 130 Ill. 258.

In Illinois, cities, in absence of express grant of authority so to do, have no power to loan, donate or pledge their money or credit in aid of private enterprise. *Johnson v.*

Stark County, 24 Ill. 75; Bissell v. City of Kankakee, 64 Ill. 249; English v. People, 96 Ill. 566; Mather v. City of Ottawa, 114 Ill. 659.

A corporate contract, strictly *ultra vires*, is defined to be one which is not within the scope of the general powers of the corporation to perform, under any circumstances; one foreign to the object and purposes of the corporation, and void for want of power over the subject—as distinguished from a case of mere excess of actual power applied to a real municipal purpose or object, or a lack of authority to the particular officers through whose agency it was executed, or an improper or irregular mode of exercising admitted power. Dillon, Mun. Corp., Sec. 548; Beach v. Fulton Bank, 3 Wend. (N. Y.) 573; Rock River Bank v. Sherwood, 10 Wis. 230; Ryan v. Lynch, 68 Ill. 160; Miller v. Goodwin, 70 Ill. 659; Weckler v. Hagerstown Bank, 42 Md. 581; Smith v. Buffalo, 1 Sheld. 493, 19 Ala. (L. J.) 397; Miner's Ditch Co. v. Zellerbach, 37 Cal. 543; Central Transportation Co. v. Pullman Pal. Car Co., 139 U. S. 24; Monument National Bank Co. v. Globe Works, 101 Mass. 57; Scheffer v. Bonham, 95 Ill. 368.

A contract strictly *ultra vires* is illegal upon the ground of public policy. Central Transportation Co. v. Pullman Pal. Car Co., 139 U. S. 24; People v. Chicago Gas Trust Co., 130 Ill. 268; Bissell v. Mich. So. R. R. Co., 22 N. Y. 258.

A corporate contract, strictly *ultra vires*, whether executed or not, whether benefits have or have not been received thereunder, is absolutely void, and neither party is estopped to set up its strictly *ultra vires* character, and this is especially true in any suit or proceeding upon the contract itself. Dillon on Municipal Corp., Sec. 458; Davis v. Old Colony R. Co., 131 Mass. 248; S. C., 41 Am. Rep. 221; Littlewort v. Davis, 50 Mass. 403; Sherwood v. Alvis, 83 Ala. 115; Kipp v. East River E. Light Co., 46 N. Y. S. 397; Germantown Farmers Mut. Ins. Co. v. Dhien, 43 Wis. 425; Cent. Transp. Co. v. Pullman Pal. Car Co., 139 U. S. 24; Pittsburgh C. & St. L. R. v. Keokuk & Ham. Bridge Co., 11 U. S. 371.

A party making with a city a contract *ultra vires*, is not estopped, when sued thereon by the corporation, to set up its want of authority to make it. Dillon, Mun. Corp., Sec. 458; Pittsburgh & St. L. R. Co. v. Keokuk & Hamilton Bridge Co., 131 U. S. 371; Central Transportation Co. v. Pullman Pal. Car Co., 139 U. S. 24; Montgomery City Council v. Montgomery & W. P. I. R. Co., 31 Ala. 76; Pa., Del. & Steam Nav. Co. v. Dandridge, 8 Gill & J. (Md.) 248, 319, 320.

The remedy, if any, in case of contract strictly *ultra vires*, is not upon the contract itself, but is in assumpsit, upon a count in *quantum meruit*, or for money had and received to plaintiff's use. Salt Lake City v. Hollister, 118 U. S. 256; Pittsburgh C. & St. L. R. Co. v. Hamilton Bridge Co., 132 U. S. 371; Central Transp. Co. v. Pullman Pal. Car Co., 139 U. S. 24; Smith v. Ala. L. Ins. & T. Co., 4 Ala. 558; Dill v. Wareham, 7 Met. (Mass.) 438; Morville v. Am. Tract Society, 123 Mass. 129, 137; Argenti v. City of San Francisco, 16 Cal. 256; Miller v. Am. Mut. Ass. Ins. Co., 92 Tenn. 167; Phila. Loan Co. v. Towner, 13 Conn. 249; Dillon on Mun. Corp., Sec. 458, 935, 938, 969; 15 Am. and Eng. Encyclo. Law, 1100; "Utica Insurance Cases," 19 Johns. 1; 8 Cow. 20; 3 Wend. 296; 4 Wend. 658.

MR. JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This was a bill by plaintiff in error to foreclose a mortgage dated April 29, 1868, given on certain real estate situate in the city of Fulton, by the Illinois Soldiers' College, a corporation, in the city of Fulton, to secure plaintiff in error in the sum of \$6,000, then by the mortgage acknowledged to be due.

The condition of the mortgage was to secure the above sum obligated to be paid to it by a certain bond of even date therewith, payable without use "whenever the defendant in error should fail to keep, maintain and continue without material interruption a college of fair order in the building on block 10 in range 10 in said city of Fulton." The mortgage otherwise was in the usual form with the

usual defeasance. The defendant in error became the successor of the Illinois Soldiers' College in 1874. To the bill filed by the plaintiff in error, the defendant in error demurred. The court sustained the demurrer, and the defendant in error electing to stand by the bill, the court entered a decree dismissing the bill for want of equity on its face, and against plaintiff in error for costs of suit.

The main ground of objection to the bill was that it showed that the bond and mortgage were given to secure a loan in aid of other than proper municipal purposes or to secure the return of a conditional donation; that the loan was for a purpose not germane to the objects of a municipal corporation, and that the city had no power to make the same. It is also insisted that the mortgage was barred by the statute of limitations.

It appears to us quite clear that the intention on the part of the plaintiff in error was to make a donation of the six thousand dollars due it from defendant in error, so long as the Illinois Soldiers' College or its successor should maintain a college of fair order, and when such institution failed to be so maintained that the donation was to revert to plaintiff in error.

Now it is quite evident that the plaintiff in error, being simply a municipal corporation, organized merely for governmental purposes, had no power in law to make any such gift, or to take an obligation like the mortgage in question conditioned on such a contingency.

The instrument if enforceable at all must be enforced in accordance with its terms. If legal, it could never be enforced so long as the college was maintained as provided. But evidently such a condition could not bind the plaintiff in error and compel it to stand by its donation even if the condition of the mortgage were fulfilled. The mortgage was therefore illegal for want of power in the plaintiff in error to receive it. Nor can it be rightfully claimed, as we think, that while the condition was void, the mortgage otherwise should be regarded as valid. The mortgage as a whole was either valid or invalid. The bill treats it as

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valid, and relies on the failure to maintain a college of fair order in the buildings as grounds of forfeiture and right to foreclose. Evidently the failure to maintain such a college can not be said to be the fulfillment or completion of the contract on the part of the plaintiff in error. It was simply a forfeiture on the part of defendant in error of an invalid contract. The rule of law quoted from Morawetz on Corporations, page 100, that "if a contract entered into by a corporation has been performed by either of the parties, the other party can not set up as a defense to an action for breach of such contract that the corporation had no authority to enter into it," can not apply here.

There has been no performance here by plaintiff in error other than the receiving of the mortgage from the defendant in error, and that was an illegal act as we have shown. The want of power by municipal corporations in this State in the absence of express authority to donate or loan money to private enterprises has often been expressly held. *Johnson v. Stork Co.*, 24 Ill. 75; *Bissell v. City of Kankakee*, 64 Ill. 249; *English v. The People*, 96 Ill. 566; *Mather v. City of Ottawa*, 114 Ill. 659.

We are of the opinion that the mortgage being void, plaintiff in error could have no right of action based on it. The right of the city to sue for the money due from defendant in error at law would be another question not involved here.

In case the mortgage could be held valid, and the condition void, the statute of limitation would have run against it because more than twenty years have elapsed since its date, and before bill filed. And the statute of limitation can be taken advantage of on demurrer where it appears on the face of the bill it has run. *Board of Supervisors, etc., v. The Winnebago Swamp Drainage Co.*, 52 Ill. 454; *Ilet et al. v. Collins et al.*, 103 Ill. 74.

In accordance with the provisions of this mortgage it could never be foreclosed so long as a college of fair order was maintained on the lot in question. Hence, in the nature of the transaction the \$6,000 was a donation or a gift so

long as the college was maintained, which might be perpetually.

We are of opinion that the demurrer was properly sustained and bill rightfully dismissed. The decree of the court below is therefore affirmed.

Alfred Godfrey v. The Streator Railway Co.

1. VERDICT—*When to be Directed for the Defendant.*—It is only where the evidence, with all fair and legitimate inferences arising therefrom, is so far insufficient to sustain a verdict for the plaintiff that if rendered it must be set aside, that the court will be justified in directing a verdict for the defendant.

2. SAME—*When it is Error to do so.*—Where the evidence tends to support the case of the plaintiff it is improper for the court to take the case from the jury.

Memorandum.—Action for killing a horse. Electric wires. In the Circuit Court of La Salle County; the Hon. DORRANCE DIBELL, Judge, presiding. Trial by jury; verdict for defendant by direction of the court; appeal by plaintiff. Heard in this court at the May term, 1894. Reversed and remanded. Opinion filed December 13, 1894.

APPELLANT'S BRIEF, H. H. DICUS AND McDUGALL & CHAPMAN, ATTORNEYS.

The general test as to the propriety of refusing to submit a point to the jury is whether their verdict on the point, if against the moving party, must be set aside as contrary to or against the weight of evidence. *Cagger v. Lansing*, 64 N. Y. 417; *Corning v. Troy Iron and Nail Factory*, 44 N. Y. 577; *Fish v. Davis*, 62 Barb. (N. Y.) 122; *Pleasants v. Fant*, 22 Wall. (U. S.) 116; *Griggs v. Houston*, 104 U. S. 553; *Montclair v. Dana*, 107 U. S. 162; *Zettler v. City of Atlanta*, 66 Ga. 195; *Jackson v. Jacksonport*, 56 Wis. 310; *Weis v. City of Madison*, 75 Ind. 241; *Hyatt v. Johnson*, 91 Pa. St. 196; *Heath v. Jaquith*, 68 Me. 433.

It is only where the evidence, with all fair and legitimate inferences arising therefrom, is so far insufficient to sustain a verdict for the plaintiff that the court must set it aside if rendered, that the court would be justified in directing a

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verdict for the defendant. Phillips v. Dickerson, 85 Ill. 511; Goodrich v. Lincoln, 93 Ill. 360; Railway Co. v. Lewis, 109 Ill. 120; Simmons v. Railroad Co., 110 Ill. 346; Railroad Co. v. Johnson, 135 Ill. 641; Purdy v. Hall, 184 Ill. 298; Pullman Palace Car Co. v. Laack, 143 Ill. 242; Gartside Coal Co. v. Turk, 147 Ill. 120; Eddy v. Gage et al., 147 Ill. 162.

Where there is evidence tending to support the case of the plaintiff it is improper for the court to take the case from the jury. Grommes et al. v. St. Paul Trust Co. et al., 147 Ill. 634.

It is an invasion of the rights of the jury, and a usurpation of their functions, for the court to determine for them what facts are proven, or attempt to tell them what their verdict should be on a question of fact. Hunter v. Feige, 90 Ill. 208.

A cause should never be withdrawn from the jury unless the testimony is of such a conclusive character as to compel the court in the exercise of a sound judicial discretion to set aside a verdict returned in opposition to it. Fellows v. St. Louis Bridge Co., 45 Ill. App. 590; L. S. & M. S. Ry. Co. v. Johnson, 135 Ill. 641; J., A. & N. Ry. Co. v. Velie, 29 N. E. Rep. 707.

On an application to take the case from the jury, whether by motion for a non-suit, or a direction of a verdict, or by demurrer to evidence, the evidence of the opposite party must be assumed to be true, and he is to be given the benefit of all legitimate inferences therefrom in his favor. Maynes v. Atwater, 88 Pa. St. 496; Walker v. Supple, 54 Ga. 178; Frost v. Gibson, 59 Ga. 600; Parks v. Ross, 11 How. (U. S.) 373; Purcelle v. English, 86 Ind. 34; Pratt v. Stone, 10 Ill. App. 633.

REEVES & BOYS, attorneys for appellee.

MR. PRESIDING JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This was a suit commenced by appellant against appellee and the Central Union Telephone Company for damages

suffered by appellant by reason of the alleged killing of his horse by appellee and the Union Telephone Co.

On the trial after the evidence was all in, appellant dismissed his suit against the Union Telephone Co., and on motion of appellee, the court excluded the evidence from the jury, and directed the jury to find for appellee. On the jury rendering verdict for appellee the court gave judgment against appellant for costs. From this judgment this appeal is taken, and the action of the court assigned for error.

The principle of law is well established in this State that it is only where the evidence, with all fair and legitimate inferences arising therefrom, is so far insufficient to sustain a verdict for the plaintiff that the court must set it aside if rendered, that the court would be justified in directing a verdict for the defendant. *Phillips v. Dickerson*, 85 Ill. 511; *Goodrich v. Lincoln*, 93 Ill. 360; *Simmons v. Railroad Co.*, 110 Ill. 346; *Railroad Co. v. Johnson*, 135 Ill. 641; *Eddy v. Gage et al.*, 147 Ill. 162.

Where the evidence tends to support the case of plaintiff it is improper for the court to take the case from the jury. *Gromes et al. v. St. Paul Trust Co. et al.*, 147 Ill. 634; *Hunter v. Feige*, 90 Ill. 208. On the morning of February 20, 1891, appellant, about half past 8 o'clock, A. M., drove down Bloomington street, in Streator, until he came to the intersection of Bloomington with Morrell street, where one of his horses stepped on a wire down in the street, highly charged with electricity, by which, receiving the full charge thereof, he was instantly killed. The evidence tended strongly to show that the night previous there had been a heavy storm of wind and sleet, by which the telephone wires in the city had been thrown down on the trolley wire of the electric street car line, and that the appellee had full notice of it and was well aware of the danger to people and animals traveling the streets if the street cars were run while the telephone wires were on and across the trolley and on the ground, for they would be heavily charged with electricity from the power house of appellee. The evidence

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tended to show that the wire causing the death of the horse was lying across the appellee's trolley wire resting on the street, and that the appellee knew it or should have known it in time to have removed it and prevented accidents. The appellee was in the use of a highly dangerous agency in operating its street railway, and was bound to corresponding great care to so use it as not to endanger the life and property of the people who might pass or drive over the street. If the jury found on the evidence as given in by appellant a case of negligence was made out, and the verdict should have been for appellant for the value of the horse, shown to have been worth \$100, then there was sufficient evidence from which the jury might have found appellee negligent as charged.

For the error committed by the court in taking the case from the jury and directing a verdict for appellee, the judgment of the Circuit Court is reversed and the cause remanded.

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Joseph K. Ostrander v. Jacob von Tobel.

1. **MECHANIC'S LIEN**—*Construction of the Statute.*—Section 28, Chapter 82, R. S., entitled "Liens," providing that no creditor shall be allowed to enforce a lien against or to the prejudice of another creditor, incumbrancer or purchaser, unless a claim for a lien shall have been filed with the clerk of the Circuit Court within four months after the last payment shall have become due and payable, is an act of limitation, and not intended merely to protect intervening purchasers without notice and judgment creditors with liens, prior to obtaining judgments.

2. **SAME**—*Notice Under Section 28.*—Section 28, Chapter 82, R. S., entitled, "Liens" was intended to give free commerce in real estate on which a lien for material or labor is sought to be enforced, unless the lienor gives notice of his rights in the time required by said section, and not having done so, the owner may sell and dispose of the premises discharged of the lien even after the notice is filed in the office of the circuit clerk.

Memorandum.—*Mechanics' Liens.* In the Circuit Court of Livingston County; the Hon. THOMAS F. TIPTON, Judge, presiding. Decree

for petitioner; appeal by defendant. Heard in this court at the May term, 1894. Reversed and remanded with directions. Opinion filed December 13, 1894.

STRAWN & NORTON, attorneys for appellant.

HERBERT POWELL, attorney for appellee.

MR. PRESIDING JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This was a mechanic's lien commenced by petition by appellee against appellant, F. P. Davis, C. M. Barreckman and James E. Morren, parties defendant. The suit was commenced April 22, 1892. The petition avers that on June 28, 1889, appellee sold to F. P. Davis materials for a dwelling house on premises described in the petition. The materials were to be furnished on or before June 28, 1890, and to be paid for one year from time of delivery of last materials; that complainant furnished said materials and they were used by said Davis in improving said property; that there was still due \$102 with interest. The petition avers that appellant had or claimed to have some interest in the premises, but that his claim was subject to appellee's lien; avers that February 28, 1891, a lien notice was filed in the office of the circuit clerk of said county properly verified and containing the names of appellee as the person entitled to lien, the amount, date of filing, name of person against whom filed, and a description of the premises charged with the lien.

The appellant answered denying that there was any fixed time of payment agreed upon between appellee, except that the same was to be paid for in a reasonable time, and denying that sufficient notice had been given or filed to entitle complainant to a lien under the statute; avers that a period of more than four months from the time the last materials, if any, were furnished, or payment was due, had elapsed before appellee filed his notice of the liens or filed for record any papers whereby innocent purchasers might be notified of his rights; avers that May 1, 1891, appellant purchased the said

Ostrander v. von Tobel.

premises of F. P. Davis for a valuable consideration and received from him a deed of conveyance for the same, and recorded his deed and took immediate possession thereof, and still retained it and was the owner thereof.

The evidence shows that the lumber was sold to Davis without any particular time for the payment and therefore the amount due appellee for the lumber became due on July 29, 1890, the date of the last delivery of the lumber; the notice did not state that the materials were sold upon any specific length of time; further shows that appellant purchased the real estate in question of Davis and took a warranty deed of the same May 1, 1891, appellee having filed his statutory lien February 28, 1891.

The cause was referred to the master with directions to report conclusions, who recommended the granting of the lien on the premises claimed by appellant, and the court granted the decree in accordance therewith for the amount found due, \$98.50. Proper exceptions to the master's report were taken by the appellant which were overruled by the court and exceptions taken.

The appellant, as the evidence shows, did not assume the payment of appellee's claim against Davis in this deed or otherwise.

This appeal presents the question of whether the appellee lost his rights of the lien as against the appellant by not giving the notice of his intention to enforce a mechanic's lien till after the expiration of four months after the time the last payment should have been made.

Sec. 28, Chap. 82, R. S., p. 912, Hurd's Statutes, provides as follows:

"No creditor shall be allowed to enforce a lien created under the provisions of this act against or to the prejudice of any other creditor or incumbrancer or purchaser unless a claim for a lien shall have been filed with the clerk of the Circuit Court as provided in section 4 of this act, within four months after the last payment shall have become due and payable. Suit shall be commenced within two years after filing such claim with the clerk of the Circuit Court or the lien shall be vacated."

We are of the opinion that the above statute is an act of limitation, and not intended to merely protect intervening purchasers without notice, and judgment creditors with liens prior to obtaining judgments.

The statute, in our judgment, was intended to give free commerce in the real estate on which a lien for material or labor is sought to be enforced, unless the leinor gives the notice in the time required by section 28, above quoted. Not having done this, the owner, Davis, was at liberty to sell and dispose of it, even after the notice was filed in the circuit clerk's office.

The mechanic's lien law should be strictly construed. *McDowell v. Rosengarter*, 134 Ill. 131; *Campbell v. Jacobson*, 145 Ill. 389.

This question being decisive of the case, the decree is reversed and the cause remanded with directions of the Circuit Court to dismiss the bill.

**Chicago & Alton Railroad Company v. Samuel Barnett,
a Minor, by Thomas Barnett, his Next Friend.**

1. **ORDINARY CARE**—*Approaching Railroad Crossings*.—A person injured by cars at a railroad crossing must show by reliable evidence that in approaching the crossing he was using ordinary care and caution for his safety, or he can not recover.

2. **EXCESSIVE DAMAGES**—*Verdicts, When Set Aside*.—Where it is apparent the jury were actuated by passion and prejudice, or some motive other than a desire to do justice between the parties, the verdict, if excessive, will be set aside.

Memorandum.—Action for personal injuries. In the Circuit Court of Will County; the Hon. DORRANCE DIBELL, Judge, presiding. Declaration in case and plea of not guilty; trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1894. Reversed and remanded. Opinion filed December 13, 1894.

EDWARD C. AKIN and GEO. S. HOUSE, attorneys for appellant.

WM. MOONEY and HALEY & O'DONNELL, attorneys for appellee.

MR. PRESIDING JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

Appellee sued appellant on an action on the case to recover damages for personal injuries received by him by reason of being run over by appellant's engine and train of cars at a highway crossing called Center street, in the city of Braidwood, or at the city limits, while appellee was driving a horse and buggy along the said street and across the appellant's railroad track at said point of crossing. The case was tried by a jury and resulted in a verdict for appellee for \$12,000, and the court requiring a remittitur of \$6,000, appellee remitted that sum and the court overruled appellant's motion for a new trial and rendered judgment for the last named amount. The declaration contained three counts, each one averring due care and caution of appellee in approaching and going on the railroad crossing over the highway with his horse and buggy, and that the appellant was negligent, first, in not ringing a bell or sounding a whistle and not keeping the same ringing or sounding until the crossing was reached, and in approaching the crossing at a high rate of speed, by means of which, while crossing on said highway, he was struck by the locomotive engine and was bruised and injured, etc.; second, that appellant ran its locomotive engine and train of cars at a high and dangerous rate of speed without giving sufficient warning of its approach to said crossing, and without guarding said crossing or providing any signal there of the approach of trains, and was thereby guilty of negligence, by reason of which the injury occurred, as charged in the first count; third, that appellant negligently suffered and permitted certain box cars to be and remain on its right of way near to said highway at the crossing of the said road, and while said box cars were so situated, ran a passenger train over its certain other tracks across the highway at a high and dangerous rate of speed, and appellee by reason of said obstruction and the presence of the box cars and the high and dangerous rate of speed, while crossing with his horse and buggy, was run over and injured as stated.

There was no guard or means of warning at the approach of trains to passers over this crossing provided, and from the nature of the situation none appeared to be required, and the rate of speed of the train of thirty-five to forty miles an hour did not seem to be unusual or dangerous in itself. The main point of contention on the trial was as to whether the whistle was sounded or the bell rung on the locomotive while it was approaching the crossing as and for the distance the statute requires, and whether any box cars were on the side track intervening between appellee and the approaching locomotive and cars on the main track while he was approaching the crossing so as to obstruct his view of the approaching train, and lastly whether he exercised care and caution in approaching the railroad crossing by looking out for the approaching locomotive and train. There is no contention of any errors of law having been committed by the court below which we regard of any importance, and we have only to deal with the questions of fact and whether the evidence is sufficient to support the verdict, both as to the main issues and the question of damages. It seems from the evidence that appellee was a youth of about fourteen years of age at the time of his injury, and had lived in the close vicinity of the crossing in question for a considerable length of time and was well acquainted with the crossing, the running of trains and the times the train arrived at the crossing from which the injury was received, called the "Hummer," and the time it crossed the crossing in question in the morning. The evidence shows that appellee resided with his parents north of the crossing, and on the morning of the 20th January, 1890, he, with his brother's horse and buggy, took the latter to a coal mine some distance south of this crossing, passing over it to the mine where his brother was at work as a coal miner, and on returning he was obliged to pass over the railroad crossing at the place where he was injured, and was there run over by the train, and the horse killed, the buggy smashed to pieces, and himself severely injured. The time when the train was due at the cross-

ing was 6:55 o'clock, A. M., and it was about five minutes behind time, therefore the injury occurred about 7 o'clock, A. M. The highway on which appellee was approaching the crossing runs in a southerly direction from the crossing, and in full sight of the railroad track for 150 yards, and there was nothing intervening between the highway of any consequence to prevent seeing an approaching train unless a train of cars stood on the side track south of and parallel with the main track on the same 100 feet right of way, and this was one of the contentions that the cars did so intervene.

In approaching the crossing the appellee would be required, in order to see a train approaching from the west, to change his position and reach his head out beyond the side curtains of the buggy. He says he stopped the horse and looked out about 300 feet before he reached the crossing and afterward before he reached the crossing he leaned toward the dashboard and looked again two or three times; he could not tell how far from the crossing; that the horse walked all the way. Appellee testified that but for the box cars intervening, he could have seen the approaching train, and that he heard no whistle. It appears from the evidence that the side and back curtains of the buggy were down and appellee muffled up with his cap drawn down and his coat collar up and the wind was blowing from the north in his face, and that it was a very cold morning. The only evidence of appellee's care is his own testimony, which is weakened and impeached by contradictory statements under oath, when he was a witness in his brother's case against appellant for the recovery for the value of the horse and buggy, in which he stated there was nothing to prevent his seeing the approaching train but a house occupied by Cooney, and did not then claim there were any box cars on the side track; appellee testified the horse, on approaching the crossing, was on a walk. In this he was contradicted by two or three other eye witnesses who testified he approached the crossing on a sharp trot and appeared to be intent on crossing the track ahead of the approaching engine. The witness is

contradicted in other material portions of his evidence by the doctor, who ordered or advised him not to carry his arm in a sling but to use it, he saying they told him to carry it in a sling. It seems to us the appellee failed to show by any reliable evidence that he used any care whatever; that he used any caution in approaching the railroad crossing. As to ringing the bell and sounding the whistle as the law requires of railroad companies while approaching a highway crossing, the evidence seems to signally fail to support appellee, who claims that was not done. While he produces some negative evidence to that effect, his witnesses testifying they did not hear it, the appellant produces the parties who testified they both rang the bell and sounded the whistle and several others who heard it. Positive evidence is entitled to greater weight than negative. This rule is well stated in *A. T. & S. F. R. R. Co. v. Feehan*, Admr., 149 Ill. 202.

The same preponderance seems against the contention that the box cars obstructed the view. To go over all the evidence and review it would render this opinion too long and we will not attempt it. The jury appears to have rendered its verdict against the manifest weight of the evidence both as to the facts in issue upon which the recovery should be based as well as to the measure of damages. It found for appellee the enormous sum of \$12,000, of which the court below compelled appellee to remit one-half under pain of giving a new trial; this would no doubt cure this error provided the verdict was not still excessive after the remittitur. *North Chicago Street Ry. Co. v. Wrixan*, Admr., 150 Ill. 532. We still think the verdict is excessive, and are convinced that if appellee would follow the advice of the physicians and take his arm out of the sling and try to exercise it, the result would be greatly beneficial and probably render it a useful limb. The jury appeared to be actuated by passion and prejudice or some motive other than a desire to do justice between the parties.

The Circuit Court should have set aside the verdict and granted a new trial.

For this error the judgment is reversed and the cause remanded.

**Joseph Cloidt and William Silk, Partners, etc., v.
William Wallace.**

1. **LIBEL**.—*Pleading General Issue and Notice of Justification*.—Where a defendant denies responsibility for a part of a libelous article published in a newspaper, he can not be compelled to justify such part in order to prove the truth of the part authorized by him. And when he pleads the general issue and gives notice that he will prove on the trial the truth of a part of the alleged libel, he may deny a part under his plea and justify as to a part under his notice, where such parts are separable.

Memorandum.—Action for libel. In the Circuit Court of Kankakee County; the Hon. NATHANIEL J. PILLSBURY, Judge, presiding. Declaration in case; plea of general issue and notice of justification; trial by jury; verdict and judgment for defendant; error by plaintiffs. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 13, 1894.

DANIEL H. PADDOCK, attorney for plaintiffs in error.

EDGAR ELDREDGE, attorney for defendant in error; HARRISON LORING, of counsel.

MR. JUSTICE CARTWRIGHT DELIVERED THE OPINION OF THE COURT.

Plaintiffs in error brought suit against defendant in error for damages to them as partners in the business of buying stock and grain in the village of Sollitt, on account of an alleged libel published in the Momence Reporter, and charged to have been printed at the instance of defendant in error. There was a verdict for defendant on which judgment was entered against plaintiffs for costs.

On the trial plaintiffs proved the publication of the article, which was as follows:

“GRANT PARK, Sept. 14, 1886.

EDITOR REPORTER: Last Monday I took twelve hogs to Cloidt & Silk at Sollitt, and on the way I took the trouble to weigh them on William Keeney's scales, which have just been placed in good repair. On weighing in Sollitt they

fell short 140 pounds. Thomas Wheeler, Chris. Deerson and several others have been making similar complaint of the same firm. Good prices and defective weights seem to be the rule of the firm. The question is, are their scales defective, or is their mental calculation deficient?

WILLIAM WALLACE."

Plaintiffs also introduced evidence that the publisher of the newspaper wrote the article in a drug store at Grant Park from statements made by the defendant, and attached defendant's name to it, and that defendant read it over and asked the publisher to put it in the paper. Defendant denied having read what was written by the publisher of the paper, or having any knowledge that the last two sentences of the article were contained in such writing. He admitted stating the matters of fact contained in the article to the publisher, who was gathering news for his paper, and said that they were read over to him, but that the last two sentences were not read, nor was their publication authorized by him. He was permitted to introduce evidence of the truth of that portion of the publication which he admitted having authorized, and this was objected to on the ground that it was not permissible under the pleadings. Defendant had pleaded the general issue and under that plea had given notice that he would prove on the trial the truth of that part of the alleged libel concerning which the evidence was admitted. The objection was that the notice did not cover the whole of the libelous matter and that defendant had no right to give notice that he would prove the truth of any part of the alleged libel unless he did so as to all of it. Defendant denied any responsibility for part of the article, and should not be compelled to justify that part in order to prove the truth of that portion which he authorized. He could deny a part under the plea of the general issue, and justify as to a part under his notice as the circumstances of the case might be. We think the evidence of justification was properly admitted. The part justified was not connected with that denied so as to be inseparable as a part of the charge. If plaintiffs established their case

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as to either part they would be entitled to recover, and we think defendant might plead differently to the different parts, denying as to one part and justifying as to another.

It is urged that the court erred in giving an instruction at the request of defendant, stating in substance that if defendant did not use the words contained in the last two sentences of the article he would not be responsible for their use unless, with full knowledge of what the reporter had said, he told him to publish such language. The only evidence that defendant authorized the publication of the article was the testimony of the publisher of the paper, that defendant asked him to put it in the paper, and consequently plaintiffs could not have been injured by an apparent exclusion of any other method of giving such authority. It is also claimed that the verdict was against the evidence, but we do not think that the claim is well founded. The only serious controversy as to matter of fact was whether defendant authorized the publication of the portion of the article which he denied, and this rested on the evidence of the publisher of the paper on one side and defendant on the other. The jury believed defendant, and we see nothing from which we can say that they were wrong. The judgment will be affirmed.

Jacob Heist v. The People of the State of Illinois.

1. **COSTS**—*In Criminal Cases.*—Where a defendant is tried upon a criminal charge and acquitted, he is absolved from the payment of all costs.

2. **SAME**—*Of Continuance in Criminal Cases.*—Where a defendant in a criminal case shows a legal right to a continuance, in order to properly present his defense, he can not be compelled to pay the costs of the term to obtain it.

Memorandum.—Error to reverse a judgment for costs rendered by the County Court of Iroquois County; the Hon. MOSES H. EVANS, Judge, presiding. Heard in this court at the May term, 1894. Judgment reversed. Opinion filed December 18, 1894.

MORRIS & HOOPER, attorneys for plaintiff in error.

W. F. PIERSON, State's Attorney, for the defendants in error.

MR. JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

Plaintiff in error, charged by indictment with the commission of a misdemeanor, at the May term, 1892, of the court below, moved for a continuance and supported his motion by affidavit. The court sustained the motion but continued the cause at his costs.

At the October term, following, a trial was had resulting in his acquittal. He now brings the record to this court and asks a reversal of the judgment against him for the people's costs of the May term, 1892, amounting to \$135.55.

Where a defendant, who is tried upon a criminal charge, is acquitted, he is absolved from the payment of all costs. *Wells v. McCulloch*, 13 Ill. 606; *McArthur v. Artz*, 129 Ill. 352.

If he shows a legal right to a continuance in order to properly present his defense, he can not be compelled to pay the costs of the term to obtain it. Judgment reversed.

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159 408

James F. Todd v. Benjamin Todd.

1. INTERPLEADER—*Controversies Between Heirs*.—A proceeding in equity by a bill of interpleader is a proper proceeding by a person having in his possession moneys belonging to the estate of a deceased person and which is claimed by different heirs.

Memorandum.—In equity. Appeal from the Circuit Court of Peoria County; the Hon. THOMAS M. SHAW, Judge, presiding. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 13, 1894.

STATEMENT OF FACTS.

On the 10th day of January, 1872, James F. Bonham, a resident of Henry county, died, leaving considerable prop-

erty and a will. He had no family of his own. The will, after devising a specific tract of land respectively to a sister, a brother, the children of a deceased brother and appellant, recited: "I devise all my other lands and real estate, not hereinbefore disposed of, to Dr. James F. Todd, my nephew. I give and bequeath to my nephew, Benjamin Todd, my railroad stock, also all my other personal estate I give and bequeath to my two nephews, James F. Todd and Benjamin Todd.

These two nephews are brothers and were on intimate terms with their uncle. James was more of a favorite, however, and hence the more liberal provision for him in the will. If the uncle had died intestate each would have received as heir a one-eighth part of the estate.

It was expected and understood before the uncle's death, that James would receive by will a large portion of the estate, and there was some talk between them to the effect that in that event James should make up to Benjamin an amount sufficient to equal a one-eighth part.

After the will was probated proceedings to contest the will were begun by brothers of the deceased. Litigation followed also on several large claims against the estate. Benjamin at this time insisted upon receiving what was bequeathed to him under the will and such an amount as James had agreed to give him to make up a one-eighth part of the estate.

There was considerable cavil between them over the matter, but finally, in July, following the death of the uncle, such a plan of settlement was agreed upon that James conveyed to Benjamin's wife fifty-one acres of land, turned over to Benjamin certain notes and money, and Benjamin executed and delivered to James a quit-claim deed of all title, right and interest to the lands of which James F. Bonham died seized and also the following instrument:

I, Benjamin Todd, of Peoria, Ills., in consideration of the conveyance to me by Dr. James F. Todd, of Kewanee, Illinois, of certain real estate known and described as follows, viz.: The south half of the south west fractional quarter of

section thirty (30), in township fourteen (14) north, range four east in Henry county, Illinois; containing fifty-one and one-half (51½) acres of land, more or less, and of one dollar in hand paid, and divers good and valuable consideration between us moving, do hereby remise, release, transfer and convey unto him, the said James F. Todd, all the right, interest and claim which I now have or may hereafter become entitled to as the heir at law of James F. Bonham, deceased, as under his will, by reason of any of its provisions in and to the personal property and estate of the said James F. Bonham, deceased, saving and excepting herefrom the railroad stock specifically bequeathed to me by said James F. Bonham in and by his last will and testament, that is to say, all railroad stock which the said James F. Bonham owned at the time of his death, or to any stock or interest which accrued after, and more especially the stock in the Galva & New Boston road.

Witness my hand and seal this — day of July, A. D. 1872.

BENJAMIN TODD. [SEAL.]

The uncle, at the time of his death, owned a bond for \$1,000, dated January 1, 1867, bearing ten per cent interest and executed by the Kansas City & Cameron R. R. Co., which matured January 1, 1892. The existence of this bond was unknown to the two nephews and the execution and the estate was settled up in 1880. It does not seem ever to have been in the possession of the uncle, but in certain deals had by him with the C., B. & Q. R. R. Co. the railroad stock was received by the railroad company and held by it. After it matured, on inquiry made by the railroad company, James F. and Benjamin Todd were discovered. The proceeds amounted to \$3,500, and each claimed the whole of it. The railroad company filed a bill of interpleader making the two claimants defendants. Each defendant answered setting out his claim. The company paid the \$3,500 into court and was discharged and the litigation over the fund continued between the two claimants.

The cause was referred to the master for proof and findings. The master heard the proof, and finding the issues

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for Benjamin Todd, recommended a decree in his favor. Exceptions were filed to the report of the master, the cause was heard on the exceptions and proofs and a decree rendered overruling the exceptions, confirming the master's report, and ordering the money paid to Benjamin Todd.

WINSLOW EVANS, attorney for appellant.

STEVENS & HORTON and McCULLOCH & McCULLOCH, attorneys for appellee.

MR. JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This is a controversy between two brothers, devisees of their uncle's will, as to who shall recover \$3,500, the proceeds of an interest-bearing bond which was discovered in the possession of the C., B. & Q. R. R. Co., twenty years after the death of the uncle and twelve years after his estate had been administered upon. The bond was purchased by an agent of the uncle in his lifetime but was never delivered to him. He was the owner of considerable property and was accustomed to deal to some extent in railroad securities. At the time of his death, he owned C., B. & Q. R. R. stock, Quincy Bridge stock, American Central R. R. stock (reported by the executor), and the bond in question, supposed to be C., B. & Q. stock. From the testimony of the executor, Martin Shallenburger, who was the legal and confidential adviser of deceased, we gather that the deceased understood that \$1,000 which he had placed in the hands of an agent for investment, had been invested in C., B. & Q. R. stock, when, as a matter of fact, it had been invested in a \$1,000 Kansas City & Cameron Railroad bond bearing ten per cent interest.

As a basis of his right to the fund, appellant set up that provision of the will which devised all the "other personal" estate to himself and appellee, and the execution and delivery to him, of an assignment of appellee's interest in the personal estate (excepting railroad stock) made July, 1872.

Appellee claims it upon the ground that it was always

supposed by the parties that the fund represented by the bond was railroad stock, and that a contract was made with appellant at the time he delivered a release of his interest in the personal estate to him that such fund, when discovered, and in whatever shape, should belong to and be the property of appellee.

There is a sharp conflict in the testimony of the parties. A careful consideration of it in connection with the testimony of the executor satisfies us, however, that it was understood and agreed by the parties that the bond, or fund, should, when found, be turned over to appellee.

We are of the opinion that the parties both understood before, at the time of, and subsequent to the execution of the release, that the fund was in railroad securities and that appellant agreed that when it should be found, it should be treated as such and taken by appellee.

Appellee is entitled to the fund, not by virtue of the will, but by his contract. While the release executed by him released all his interest as heir and devisee, it did not release an interest which he had by contract or purchase from appellant.

The term railroad stock did not include the \$800 in Quincy Bridge stock any more than it did this bond. Considering the release, with these two funds in view, there was a latent ambiguity which it was proper to explain by parol evidence, it would seem. But we are clearly of the opinion that appellee established his claim to the fund by contract, and, therefore, agree with the Circuit Court. Decree affirmed.

Lewis E. Dillman v. John W. Nadelhoffer.

1. CONTRACTS OF GUARANTY--*Promissory Notes*.—The undertaking of a guarantor of collection of a note is the same as that of an assignor. It is in effect that the note shall be collected at its maturity and assumes an obligation to pay it if the holder shall, with reasonable diligence and

Dillman v. Nadelhoffer.

without avail, employ the usual legal means to collect it of the maker, unless such means would be unavailing on account of the insolvency of the maker.

2. *SAME—Requisites of a Recovery.*—In order to recover upon a guaranty it is necessary, if diligence by suit is relied upon, to prove the institution of the suit at the first term of the court having jurisdiction after the maturity of the note and prosecution thereafter, with reasonable diligence and without avail.

3. *SAME—What Reasonable Diligence Does Not Require.*—Reasonable diligence does not require the holder of a note in a suit against the guarantor for the collection of the same to admit an affidavit for a continuance and thus avoid the delay occasioned by the continuance.

Memorandum.—Assumpsit. In the Circuit Court of Will County; the Hon. CHARLES BLANCHARD, Judge, presiding. Trial by the court without a jury; finding and judgment for plaintiff in error by defendant. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 18, 1894.

GEORGE S HOUSE, attorney for plaintiff in error.

HILL, HAVEN & HILL, attorneys for defendant in error;
HALEY & O'DONNELL, of counsel.

MR. JUSTICE CARTWRIGHT DELIVERED THE OPINION OF THE COURT.

Defendant in error brought suit against Calvin Knowlton, since deceased, and plaintiff in error, upon written guaranties of collection indorsed upon two notes of Edward R. Knowlton and Andrew Dillman, dated April 18, 1883, for \$3,000 each, and payable to defendant in error on July 1, 1884, and July 1, 1885, respectively, with interest at six per cent. An attachment was sued out in aid of the suit, on the ground of alleged fraudulent concealment and disposition of property by plaintiff in error, so as to hinder and delay creditors, and an issue was made upon the affidavit for such attachment. Calvin Knowlton died while suit was pending, and his death being suggested of record, the suit proceeded against the plaintiff in error. The issues on the guaranties and on the affidavit were both submitted to the court for trial without a jury and were both found for defendant in

error. The damages were assessed at \$6,638.66, and judgment was entered for that amount and costs. The findings and judgment of the court on both issues are called in question, and it is contended that there was such delay in the prosecution of suits against the makers of the notes for their collection as released defendant in error, and that the transfer of property by him to his wife, found to be fraudulent as to creditors, was not proven to be such.

The guaranties indorsed upon the notes were alike and were in the following words: "For a valuable consideration, we do hereby guarantee the collection of the within note at its maturity." The undertaking of a guarantor of collection of a note in this State is the same as that of an assignor. *Judson v. Goodwin*, 37 Ill. 286. He agrees that the note shall be collectible at its maturity, and assumes an obligation to pay it if the holder shall, with reasonable diligence and without avail, employ the usual legal means to collect it of the maker, or if the institution and prosecution of a suit would be useless and unavailing on account of the insolvency of the maker. In the absence of the words "at its maturity" the contracts would be guaranties of collection of the notes at their maturity, and those words neither add to nor detract from the contract. If those words had not been used in this case, they would have been implied by law, and therefore the contention of counsel for defendant in error, that their use made these guaranties exceptional and precisely like a guaranty of payment, is without foundation. In order to recover upon the guaranties, it was necessary, if diligence by suit was relied on, to prove the institution of suits at the first term after the maturity of the respective notes and their prosecution thereafter with reasonable diligence and without avail. *Lusk v. Cook*, Breese 53; *Bestor v. Walker*, 4 Gil. 3; *Robinson v. Olcott*, 27 Ill. 181. Or there might be a recovery if it were shown that suit would have been unavailing. *Thompson v. Armstrong*, Breese 53; *Bledsoe v. Graves*, 4 Scam. 382; *Schuttler v. Piatt*, 12 Ill. 417; *Pierce v. Shorl*, 14 Ill. 144.

The first note matured July 1, 1884, and suit was begun

against the makers July 14, 1884, to the first term of court after its maturity, which was the September term, 1884. The defendants in that suit filed their plea of the general issue with an affidavit of defense to the entire cause of action. During the term they obtained leave to file additional pleas, and entered their motion for a continuance. The motion for continuance was heard on the affidavit of Andrew Dillman alleging the absence of a material witness and stating the facts to be proved by such witness. The motion was sustained by the court and the cause continued, and the defendants on the same day filed seven additional pleas. It is charged that the plaintiff was guilty of such negligence in suffering a continuance by order of the court at that term as discharged the guarantors, and the method proposed by which a continuance would have been defeated, is that plaintiff should have admitted the affidavit in evidence because the testimony of the absent witness would not have been competent, and the plaintiff could have beaten the defendants on the merits. The court held the affidavit sufficient and necessarily held the proof competent and material. The use of reasonable diligence certainly did not require that plaintiff should admit the affidavit even if the same counsel who presented it to the court and secured the continuance should now be able to show that the evidence would not have been competent. The cause was continued against plaintiff's will, and if the court was in error plaintiff was not chargeable with it. The case was not at issue and was not brought to issue until March, 1885. In the meantime thirteen replications were filed to the above additional pleas. Rejoinders to some and replications to others were filed. Some demurrers were sustained and some were taken under advisement by the court. When the cause was reached at the January term, 1885, it was passed because not at issue.

At the same term defendants filed six additional special pleas, and afterward withdrew the seven additional pleas first filed, and this disposed of the demurrers under advisement. The pleading went on until finally all pleas but the

general issue were withdrawn, and it was stipulated that all defenses might be made under that plea. At the May and September terms, 1885, the cause was not reached for trial. Between these terms the defendant Edward R. Knowlton died, July 21, 1885, insolvent, and his estate paid a dividend of eight and one-tenth cents on the dollar, which was credited on these claims. At the January term, 1886, the surviving defendant, Andrew Dillman, moved for a change of venue, which was allowed, and the venue changed to Livingston county, where, at the May term, 1886, a jury was waived, no defense was made and judgment was entered. Execution was issued May 21, 1886, and \$6,122 was realized to apply on the judgment. Andrew Dillman had been the owner of property before this time sufficient to satisfy the note, but at the time judgment was obtained no more could be collected than was collected. There was no lack of diligence in the proceeding on the part of plaintiff. Such delay as occurred was due to much pleading, and the defendants were privileged to set up defenses even if none were subsequently made at the trial.

The second note matured July 1, 1885, and before its maturity the makers obtained an injunction against its collection, and the injunction was in force until February 20, 1886. Suit was begun on the note April 12, 1886, against Andrew Dillman, the other maker having died as above stated, and the summons was returnable to the May term, 1886. The declaration was filed only five days before that term, and it is insisted that this was negligence on the part of plaintiff in the prosecution of that suit. Before this time the court, at the January term, 1886, had ordered a special term commencing April 26, 1886, for chancery business only, and had ordered that such chancery business should continue through said May term, subject to interruption by the criminal calendar, and if the chancery and criminal calendars should be completed by June 14th, a calendar of causes in which a jury had been waived prior to the order should be called, but that there should be no law trial calendar for jury cases at said term. On the first day of the

May term, and before default day, the appearance of the defendant was entered by counsel, so that certainly no default could have been taken if the declaration had been filed earlier. No trial could have been had at the term on account of the order of the court.

But the question is not material, since the defendant was hopelessly insolvent at that time. Default day at the May term was May 19th, the same day that the judgment was entered in Livingston county under which all his property, subject to execution, was taken. The argument here is that plaintiff, by getting default May 19th, could have got execution quicker than he could get it from the foreign county on the judgment in his favor, the same day, and in that way might have got ahead of himself. Such a competition would have benefited nobody, as the money realized under the execution from Livingston county was applied on the obligation of the same persons, and it could make no difference to the guarantor of both notes which note it was applied on.

At the September term, 1886, the suit on the second note was not reached for trial, and at the January term, 1887, the defendant took a change of venue to Livingston county where, at the May term, 1887, he withdrew his appearance and judgment was entered.

Three executions were successively issued to the sheriff of Will county on the judgment and were each returned "no property found."

We see no reason for holding that plaintiff in error was released as guarantor of either of the notes.

The transfer alleged to be fraudulent as to creditors and made the basis for the attachment consisted of a bill of sale made by plaintiff in error to his wife of household and personal property. It was shown by his own declarations to have been made merely to prevent creditors from taking the property. The evidence justified the finding of the court on that issue.

The judgment will be affirmed.

56	402
100s	150
56	402
100	*464

**Great Western Telegraph Company, for the use, etc.,
v. Gardner T. Barker.**

1. **CORPORATIONS—No Liability of Subscribers to Pay Until Assessment.**—Under a contract between a corporation and the subscribers for shares of its capital stock, by which the subscribers are to pay for the stock at such times and in such amounts as the directors from time to time may order, the subscribers do not become liable to pay until a valid assessment has been made.

2. **SAME—Assessments in Violation of Subscribers' Contract Void.**—An assessment in violation of a contract with the subscribers of the capital stock of a corporation creates no liability to pay.

3. **STOCKHOLDERS—Corporation Not the Agent of.**—A corporation is not the agent of its stockholders in respect to their contract liability in any other sense than the payee of a note payable on demand is the agent of the maker to make such demand.

4. **INSOLVENT CORPORATIONS—Assessments by Courts.**—The making of an assessment upon the capital stock is one of the powers of the board of directors, but in default of its exercise by them it may be done by a court of competent jurisdiction in a proceeding properly before it.

5. **LIMITATIONS—Assessments upon Capital Stock.**—The statute of limitations in the case of an assessment by a corporation upon its stockholders, begins to run at the date of the assessment when the cause of action accrues.

6. **PARTIES—Corporations and Stockholders.**—Where the cause of action relates to property rights or liabilities of the corporation, the stockholders simply as stockholders, are not necessary parties; but if the object is to charge them personally on account of corporate property, or to obtain any relief against them with respect to it, they are proper and necessary parties.

7. **CORPORATE ASSETS—Demands Against Stockholders.**—As regards the creditors of a corporation there is no distinction between a demand against a stockholder upon his subscription and other assets which may form a part of the property of the corporation.

8. **CORPORATE POWERS—In Making Assessments.**—The board of directors of a corporation in making an assessment upon the stockholders can not represent the stockholders so as to waive or in any manner affect their rights to a lawful assessment.

9. **COURTS—Collateral Impeachments of Judgments.**—A court may have jurisdiction of the subject-matter and of the parties to a suit, but its judgment may be void because it has exceeded its jurisdiction, and in such case it may be collaterally impeached.

10. **STOCKHOLDERS—Nature of Their Relation to the Corporation.**—A stockholder, by becoming a member of a corporation, agrees that his in-

Great Western Telegraph Co. v. Barker.

terest as such shall be managed by the corporation. The rendition of judgments against it may extinguish the value of his interest, but as a stockholder he has no right to appear and defend for it in suits against it.

Memorandum.—Assumpsit. In the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding. Declaration on a contract of subscription; judgment on demurrer to declaration; error by plaintiff. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 13, 1894.

STATEMENT OF THE CASE.

Plaintiff in error brought suit for the use of its receiver against defendant in error on a contract of subscription for 100 shares of its capital stock. The declaration, with the copy of the contract sued on annexed thereto, was as follows:

STATE OF ILLINOIS, } In the Circuit Court of Peoria County.
Peoria County. } To the February term, A. D. 1894.

The Great Western Telegraph Company, a corporation duly organized and existing under the laws of the State of Illinois, plaintiff in this suit, for the use of Frank H. Helmer, its receiver, by Israel C. Pinkney, its attorney, complains of G. T. Barker, defendant in this suit, who has been duly summoned of a plea of trespass on the case on promises. For that, whereas, the plaintiff is a corporation, and was organized in the year 1867, under and by virtue of a law of the State of Illinois providing for the establishment of telegraphs, which was enacted and went into effect in the year 1849, and having a capital stock of three million dollars (\$3,000,000), divided into shares of the par value of twenty-five dollars (\$25) each, the subscriptions and payments for which stock by its subscribers and stockholders constituted, and constitute, the means and fund for the prosecution of the plaintiff's business and the payment of its debts.

And the plaintiff, being such corporation as aforesaid, the said defendant heretofore, to wit, on the 28th day of January, A. D. 1870, at the county aforesaid, made and entered into an agreement in writing with the plaintiff, in and by which agreement the said defendant subscribed for, and

agreed to and with the plaintiff to take 100 shares of the capital stock of the plaintiff, and to pay for the same in the manner following, that is say: five per centum of the par value thereof at the time of making said agreement and the balance of the said par value thereof, to wit, of twenty-five dollars (\$25) upon each of said shares so subscribed for, and agreed to be taken by said defendant as aforesaid, from time to time, as the directors of the plaintiff should order; and plaintiff further avers that it was in and by said agreement provided that no one of the several orders so to be made in pursuance thereof, as aforesaid, should direct or call for the payment of any sum of money in excess of the sum of ten dollars upon each and every of the said shares so subscribed for and agreed to be taken, as aforesaid.

And the defendant thereby, for a valuable consideration, undertook and promised to pay to the plaintiff, for each and every share so subscribed for by the defendant, as aforesaid, the sum of twenty-five dollars (\$25), (except five per centum of the said amount, which was payable by the terms of said agreement, at the time of the making of the same) in such installments and at such times as said defendant might be lawfully called upon and required to pay the same, and according to the legal tenor and effect of the said agreement.

And plaintiff further avers that the said defendant has never heretofore paid to the said plaintiff more than the sum of ten dollars (\$10) upon each and every of the said shares so subscribed for and agreed to be taken by him as aforesaid, so that there was, on and previous to the 10th day of July, A. D. 1886, a balance unpaid upon said shares of not less than the sum of fifteen dollars (\$15) upon each and every of said shares, and which was then liable to be called for, and ordered and required to be paid under and by virtue of the terms of said agreement.

And plaintiff further avers that a large number of other persons than said defendant subscribed for and agreed to take other shares of said capital stock and became stockholders of the plaintiff, and to the extent and amount, in-

cluding those subscribed for and agreed to be taken by the defendant, as aforesaid, of all the shares into which said capital stock was divided, all of which was done previous to the year A. D. 1872.

That a certain suit was begun on or about the 19th day of November, A. D. 1869, in the Circuit Court of Cook County, in the State of Illinois, on the chancery side thereof, wherein one Jeremiah Terwilliger and certain other persons, stockholders of the plaintiff, were complainants (and which suit was so commenced on behalf of said Terwilliger and said other persons, and all others similarly situated), and also wherein the plaintiff and others were defendants, and in which suit the plaintiff was duly summoned, and appeared, and submitted to the jurisdiction of the said court; and which suit has been, ever since its commencement, and now is, pending and undetermined in said court; that certain proceedings were afterward therein had; that the said Circuit Court did therein, on, to wit, the 7th day of October, A. D. 1874, take jurisdiction and control of the plaintiff and its powers, property and affairs, and appoint a receiver for the plaintiff, and conferred upon him all the powers and duties usually granted and imposed upon receivers in such cases; and which order of appointment has never been heretofore revoked, vacated, annulled nor set aside; and the plaintiff avers that its business, powers and duties, and the powers and duties of the board of directors of the plaintiff have been thereby vested in, and exercised, managed and controlled, by the said court and said receiver, at all times heretofore and from the time of said appointment, of all of which the said defendant had notice; that previous to the 10th day of July, A. D. 1886, by an order then duly made and entered in said chancery cause of Terwilliger and others against the plaintiff and others, one Elias R. Bowen became and was the receiver of the plaintiff, and remained and was such receiver therein from the making of such order, until, to wit, the 20th day of March, A. D. 1892, when he, the said Bowen, died; that afterward and on, to wit, the 22d day of March, A. D. 1892, by an

order then duly made and entered in said chancery cause, one Frank A. Helmer, the above named, was appointed and therein became and was the receiver of the plaintiff, in the place and stead of said Bowen, deceased, and has ever since continued to be, and has remained and still is such receiver, so that the plaintiff avers that the said Frank A. Helmer, as such receiver, is in possession of, and entitled to receive, the property and effects of the plaintiff.

Plaintiff further avers that previous to the 10th day of July, A. D. 1886, it had become and was justly indebted to various and sundry persons in a large amount, to wit: In the sum of four hundred thousand dollars (\$400,000), and which indebtedness has never been paid; that the whole of said indebtedness accrued against said plaintiff subsequent to the making and entering into the said contract of subscription and agreement to take and pay for the said shares, by the said defendant; that on the said last mentioned date, and for a long period previous thereto, the plaintiff had no property, real or personal, with which to pay the said indebtedness or any part thereof, except the amounts unpaid upon the shares of its capital stock, subscribed for and agreed to be taken by the defendant and by its other stockholders and subscribers to its capital stock as aforesaid; that previous to said last mentioned date, a small number of said stockholders had paid to the plaintiff twenty-five dollars (\$25) upon each of the shares of said capital stock subscribed for by them, respectively, and the par value and in full for the same; that the balance and remainder, and the others of said stockholders and subscribers, have not now, and had not previous to said last mentioned date, nor have any of them, paid more than the sum of ten dollars (\$10) upon each and every of the shares of said capital stock severally subscribed for, or held by them; that many of them have never paid more than the sum of fifty cents upon each and every of such shares severally subscribed for by them; that there was on said last mentioned date, a balance and amount unpaid upon each and every of the shares of said capital stock (excepting those which have been paid for in full as

aforesaid), including the said shares subscribed for by defendant as aforesaid, of not less than fifteen dollars (\$15), and which the said stockholders, including the defendant, were, on said last mentioned date, liable to be severally called upon and ordered to pay according to the terms of the said agreements of subscription; that it therefore became and was necessary that the said stockholders and each of them (except those who had paid in full), and including the said defendant, should severally be ordered to contribute and pay a certain portion *pro rata*, of the par value of the shares of said capital stock subscribed for by them, to be used and applied in payment of the said indebtedness, and the expenses of said receiver, incurred in and about the affairs of the plaintiff; and plaintiff further avers that all of said stockholders of plaintiff were not made parties to said suit and proceeding in said Circuit Court of Cook County, and that it was impracticable to make them such parties; and plaintiff further avers that certain other proceedings were therein in said suit had, that the said court, having then and there full and competent jurisdiction, power and authority in the premises, did, on said tenth (10th) day of July, A. D. 1886, make and render therein a certain decree, and did in and by said decree, find and declare, order and decree, as follows, to wit:

That the plaintiff is a corporation and was duly organized in the year 1867, under and by virtue of a law of the State of Illinois providing for the establishment of telegraphs, which was enacted and went into effect in the year 1849; that the said suit was commenced in the year 1869, against the plaintiff and certain other persons, who were each duly served with process, and appeared in said suit in person and by counsel, and that said suit has ever since been, and is now, pending and undetermined in said court; that a receiver was appointed in said suit of and for the plaintiff and its property both real and personal, on the 7th day of October, A. D. 1874, upon supplemental bill of complaint filed in said suit, and on account of mismanagement, and malfeasance of the then officers of the plaintiff, and, as alleged

and set forth in said supplemental bill, and as well by consent and stipulation of the plaintiff and the other parties to said suit, that said receivership has never since been discontinued; that the plaintiff is largely indebted and to the extent of more than three hundred and seventy-five thousand dollars (\$375,000), and which indebtedness is in the form of judgments and decrees rendered against the plaintiff; that about two-thirds of said indebtedness accrued against the plaintiff, and was created previous to the first day of September, A. D. 1872, and on account of the construction of its telegraph lines and other property, and material furnished and labor performed and money advanced in and about such construction, and in and about the operation of the lines of plaintiff; that a large portion of this two-thirds of said indebtedness was and is for money loaned and advanced to the plaintiff, and which was used by it in the construction and operation of its telegraph lines and other property; that said court had, before said tenth (10th) day of July, A. D. 1886, by reference had for that purpose in said suit, determined and found the entire indebtedness of the plaintiff, and the name of each creditor of the plaintiff, and the amount due each, and that the same then appeared by the records in said suit; that each and all of said creditors did, under the orders of said court in said suit, make proof before said court of their several claims, judgments and decrees against the plaintiff, and did thereby make themselves parties to said suit; that all the property of the plaintiff had before said last mentioned date been sold and disposed of, under the orders of said court in said suit, subsequent to the said appointment of the receiver as aforesaid, and the proceeds therefrom distributed to the creditors of the plaintiff; that on said last mentioned date the plaintiff had no property, real or personal, except as thereafter stated in said decree, with which the said indebtedness or any part thereof could be paid; that the only means or resources that the plaintiff had on said last mentioned date for the payment of said indebtedness were and are the balances and amounts remaining

unpaid and due from its stockholders upon their several subscriptions to its capital stock, and the amounts unpaid upon the capital stock of the plaintiff; that there are about two thousand stockholders of the plaintiff, who are widely scattered through more than twelve different States and Territories of the United States, and in other places, and the larger portion of whom live at great distances from the place of holding said court, and from said county of Cook, while the residences of many of them are entirely unknown to said receiver or his solicitor, although diligent inquiry had been made by them in reference thereto, and that it was and is therefore impracticable that all of the said stockholders should be made parties to said suit and proceeding; that the said subscriptions to the shares of said capital stock were made principally in the years 1868, 1869, 1870 and 1871; that many of the stockholders of the plaintiff have become insolvent or have died since their subscriptions were made; that a few of said stockholders have paid the full par value of twenty-five dollars on each and every share thereof; that some of said stockholders have paid forty per cent of such par value, or ten dollars on each share subscribed for or held by them; that many of said stockholders have paid only fifty cents upon each share subscribed for or held by them; that all of said stockholders, excepting those who have paid twenty-five dollars on each of the shares of said stock subscribed for or held by them respectively, now owe and are liable to the plaintiff for an unpaid balance upon their several subscriptions to such stock of not less than fifteen dollars (\$15) on each share, or sixty (60) per centum of the par value thereof, and that many of them owe thereon much more than sixty per centum of the par value thereof; that the liability of the stockholders to said company is based upon and controlled by contracts of subscription made with said company, and in and by which contracts the said stockholders agree to take the number of shares subscribed for by them, and pay for the same in installments, as follows: Five per centum of the par value thereof at the time of the making of their respective subscriptions

therefor, and the balance of said par value as the directors of the plaintiff from time to time should order; that the said stockholders who have not paid in full, as aforesaid, are severally liable; liable to the plaintiff for the balances now unpaid upon the shares of such stock subscribed for or held by them, being the difference between the amounts actually paid thereon and the par value thereof; that the said unpaid balances still remain liable to be called for, and ordered and required to be paid by the said subscribers, stockholders and their assigns; that the collection of whatever sums are required to be paid by said stockholders, in order to pay the said indebtedness, is likely to be attended with great difficulty, labor and expense; that it was, therefore, necessary and proper that thirty-five per centum of the par value of each share of the capital stock subscribed for and agreed to be taken or held by said stockholders, and not paid for in full, should be called for and required to be paid by them and their assigns for the purpose of paying said indebtedness; and which said findings and declarations by said court in said decree, plaintiff avers, were and are true.

Plaintiff further avers that the said court did, for the purpose of paying the said indebtedness of the plaintiff, also, in and by said decree, order, adjudge and decree as follows, to wit: that a call or assessment be made upon the stock and stockholders of the plaintiff (excepting those who have paid in full), their legal representatives and assigns, of thirty-five per centum of the par value of the shares of said stock subscribed for or held by them, being \$8.75 on each and every share thereof, and that the stockholders of the plaintiff, and each and every of them (excepting those who have paid \$25 on each and every share subscribed for or held by them), and their legal representatives and assigns, pay to the receiver of the plaintiff, so appointed, as aforesaid, the several amounts so called for and assessed and required and ordered to be paid, namely, \$8.75 on each and every share subscribed for or held by them respectively; and that the same be paid upon the demand of said receiver or his agent, and that the said receiver should at once proceed to collect the sums so

ordered paid by said decree, and make all necessary demands for such payments, employ such assistance and counsel, take such action and institute such suits and proceedings in the name of the plaintiff, and in such jurisdictions as the said receiver should be advised, or deem expedient or proper, and for the purpose of enforcing the payment of the said sums ordered paid as aforesaid, and which said decree was duly entered of record in said suit on said tenth (10th) day of July, 1886, of all of which said defendant had notice.

And the plaintiff avers that thereupon, and from the time of the making and entering of the said decree as aforesaid, and thereby, the said defendant became indebted to the plaintiff, and was liable to pay to the plaintiff the sum of eight dollars and seventy-five cents (\$8.75) upon each and every of the said shares so subscribed for by him as aforesaid, to wit, the sum of \$875, upon and according to the demand of said receiver of the plaintiff.

And plaintiff further avers that the said receiver of the plaintiff, to wit, the said Bowen, as such receiver, and in pursuance of the terms of said decree, did, on, to wit, the 27th day of January, A. D. 1888, at, to wit, the county aforesaid, make proper and lawful demand upon the said defendant, that he pay to him as the receiver of the plaintiff, the said sum of money last above mentioned, within five days from the said last mentioned day, and also did at the same time give notice to the said defendant of the making and entering of said decree.

And the plaintiff avers that although often requested, the defendant has not paid the said sum of money, or any part thereof, but to pay the same has neglected and refused, and still refuses, to the damage of the plaintiff in the sum of two thousand dollars (\$2,000).

Copy of contract sued on :

“Capital, \$3,000,000. Shares, \$25. Assessments not to exceed \$10 on a share.

Subscription list for the capital stock of the Great Western Telegraph Company.

We, the subscribers hereunto, for value received, sever-

ally, but not jointly, agree to take the number of shares in the capital stock of The Great Western Telegraph Company placed opposite our respective names, and pay for the same in installments, to wit: five per cent on amount subscribed for, and the balance as the directors from time to time may order; in consideration thereof, The Great Western Telegraph Company agrees that when forty per cent of the par value of the shares shall have been paid under such orders, and the installment receipts therefor surrendered to the company, the number of shares severally subscribed by the undersigned, shall be issued to them as full paid stock by the said company.

Scott and St. John are appointed agents to solicit stock and receive only the first installment of five per cent (fifty cents on a share) at the time of subscribing.

J. SNOW, Secretary.

Names.	Residence.	Date of Subscription.	Number of Shares.
G. T. Barker.	Peoria.	January 28, '70.	One hundred."

A demurrer to the declaration was interposed and sustained, and plaintiff abiding by its declaration, judgment was rendered for defendant for costs; to reverse that judgment this writ of error was sued out.

THOMAS J. SUTHERLAND and ISRAEL C. PINKNEY, attorneys for plaintiff in error.

BRIEF FOR DEFENDANT IN ERROR, STEVENS & HORTON,
ATTORNEYS.

While the contract of subscription is a contract to pay, it is not an absolute promise, but upon condition that an order therefor is made by the board of directors. Such a promise, like any other of that character, does not mature until the condition is legally performed—until a valid order or call is made. Cook on Stockholders, Sec. 105; Cuykendall v. Corning, 88 N. Y. 129.

Justice between the shareholders of a corporation requires that all the shareholders should contribute in respect of

Great Western Telegraph Co. v. Barker.

their shares at the same time and in ratable amounts; a call requiring some shareholders to pay any more than others would, therefore, be invalid. But if some shareholders have already contributed more than others, it would be not only the right, but the duty of the directors to make calls upon the other shareholders in such amounts as to equalize the contributions of all. Morawetz on Corporations, Sec. 154. A call can not be made so as to affect a part only of the subscribers. It must be made on all alike, or it will be void. The courts will not allow the directors of a company so to proceed as to require some of the stockholders to pay calls and not to require others to do the same. Any such attempt will be promptly set aside and rectified. Cook on Stockholders, Sec. 114; see, also, *Great Western Telegraph Co. v. Gray*, 122 Ill. 630; *Pike v. B. & C., etc., R. R.*, 68 Me. 445; *Great Western Telegraph Co. v. Burnham (Wis.)*, 47 N. W. 373; *Spangler v. I. & I. C. Ry. Co.*, 21 Ill. 276; *Pike v. Shore Line R. R.*, 68 Me. 445; *Chandler v. Brown*, 77 Ill. 333; *Lamar Insurance Co. v. Gulich*, 102 Ill. 41.

MR. JUSTICE CARTWRIGHT DELIVERED THE OPINION OF THE COURT.

The declaration in this case is the same in substance as the one which we held subject to demurrer in *Bennett v. Great Western Telegraph Co.*, for use, etc., 53 Ill. App. 276. From its allegations it appears that a suit in equity was commenced in 1869, against plaintiff by some of its stockholders; that the other stockholders, among whom was defendant, were not made parties because impracticable; that a receiver was appointed on account of mismanagement and malfeasance of the officers of plaintiff and by consent and stipulation of the plaintiff and the other parties to said suit; that under orders of court entered in said suit, certain creditors of plaintiff proved claims against it; that a decree was entered finding that some subscribers for stock had paid in full \$25 for each share, some had paid \$10, and some fifty cents on each share, and assessing thirty-five per cent on all who had not paid in full, regardless of what they had paid,

and that defendant was one of those who had paid \$10 on each share subscribed for by him.

The contract of defendant set out in the declaration only bound him to contribute ratably to the payment of the debts of the corporation. 1 Morawetz on Priv. Corp., Sec. 154; Cook on Stock and Stockholders, Sec. 114.

The contract was to pay at such times and in such amounts as the directors from time to time might order, and under such a contract the subscriber does not become liable to pay anything until a valid call or assessment has been made. Cook on Stock and Stockholders, Sec. 105; Banet v. A. & S. R. R. Co., 13 Ill. 504; Spangler v. I. & I. C. Ry. Co., 21 Ill. 276. The assessment was shown by the declaration to have been made in violation of defendant's contract, and to have been such that if made by the directors under the terms of the contract it would have been void, and created no liability on his part to pay. It is claimed, however, that he can make no defense under his contract because he was represented in fixing his liability by the corporation which was the other party to his obligation, and which therefore represented both sides of the contract in the suit in equity, and that while Terwilliger and other of his fellow stockholders were obtaining an assessment the plaintiff was his representative in making defenses against it.

Plaintiff in error claims that in the case of Bennett v. Great Western Telegraph Co., *supra*, we misconstrued the decision of the Supreme Court in Great Western Telegraph Co. v. Gray, 122 Ill. 630, and that our decision was against the weight of authority. We were not unmindful at that time that there were decisions in support of the doctrine of representation to the extent contended for, but none were cited, and as we then regarded and still regard the Gray case as an authority in support of our decision it did not seem necessary to call attention to such decisions. Some cases on that subject are now referred to, but perhaps more to the purpose of counsel than any that have been cited, and directly supporting his claim is the case of Lycoming Fire Ins. Co. v. Langley, 62 Md. 196.

In the case of Glenn, Trustee, v. Williams, 60 Md. 93, which is cited by counsel and also by the Supreme Court in the Gray case, among the defenses to the assessment was the fact that the stockholders were not parties as individuals to the suit in Virginia and had no opportunity to defend against the establishment of debts against the corporation which they were assessed to pay, and it was held that they were represented in their corporate capacity by the president and directors, who were intrusted with the management of the corporate interest of all the stockholders. The stockholders were held to be concluded as to such debts the same as they would be in any ordinary action against the corporation to establish and recover a debt, and not entitled to set up the statute of limitations against the claims so established, because it was for the corporation to decide whether that statute should be resorted to as a defense against them. It was also held, as in the Gray case, that the statute of limitations did not begin to run against the cause of action on the subscription until the call was made. We see nothing in that case conflicting with our decision. But in the case of Lycoming Fire Ins. Co. v. Langley, *supra*, it was held that the defendant was barred from his personal defense under his contract. That was a suit for the use of a receiver against a Maryland policy holder to recover two assessments on his premium note. One was made by the directors before the receiver was appointed, and the other by the receiver under an order of a court in Pennsylvania. It was held to be error to instruct that if the receiver, in making his assessment, failed to assess the premium notes in force during a certain period, for losses and incidental expenses occurring and accruing during the period, the plaintiff could not recover, and it was decided that the defendant, as a policy holder, and consequently member of the Mutual Insurance Company, was in contemplation of law before the Pennsylvania court, and that the order of that court was a conclusive determination what notes should be assessed and the amount he was liable to pay on his contract.

The Supreme Court of this State, in the Gray case, referred to Glenn v. Williams, 60 Md. 93, as an authority on the doctrine of representation, but made no reference to the insurance case. The case of Sanger v. Upton, 91 U. S. 56, was also cited in the Gray case with approval. In that case the order was to pay the unpaid balances of the stock subscriptions, and the assessment was just such as could be legally made by directors under the contracts of subscription. It was held not necessary that the stockholders should be before the court when it made the assessment, and the only question personal to the appellant, Mary E. Sanger, was whether she owned the stock, which was decided against her on the ground that she was estopped to deny her ownership.

Plaintiff in error also relies upon the cases of Hawkins v. Glenn, 131 U. S. 329, and Glenn v. Liggett, 135 U. S. 543. In those cases the call was for thirty per cent of the subscriptions, and it clearly appears would have been binding if made by the officers of the corporation. In the first mentioned case the court said :

“ But it is said that a binding assessment can not be levied without the presence of the stockholders or service of process or notice upon them. Under the charter of this company a call could only be made by the president and directors and was a corporate question merely, and in the situation of the company's affairs it was a duty to make it, failing the discharge of which by the president and directors, creditors could set the powers of a court of equity in motion to accomplish it. Executing in that regard a corporate function for a corporate purpose, it is difficult to see upon what ground it could be held that the court could not order an assessment operating upon stockholders, who would be bound if the president and directors had ordered it.”

These cases recognize the doctrine that the court in making an assessment is exercising a corporate function within the limits of a corporate power. The language used is similar to that employed by the Supreme Court in the Gray case. The latter case as before stated we regard as an

authority that a stockholder is not barred of his personal defenses in such a case. One of the points in that case was that the claim was barred by the statute of limitations, and this was treated as a good defense if the statute had run, but it was held that the cause of action accrued at the date of the assessment and that it had not commenced to run when the assessment was made. There was evidently no claim that the statute had run after the assessment which had been recently made. If the order of assessment concluded Gray it did so as to any defense he might have had under that statute equally with all others. The Supreme Court held no such doctrine, but disposed of that defense on other grounds.

The case of *Ward v. Farwell*, 97 Ill. 593, was there cited, and in that case it was held that the stockholders, simply as stockholders, were not necessary parties; but if the object was to charge them personally on account of corporate property or to obtain any relief against them with respect to it, they would be proper and necessary parties.

It was decided that Gray could not question, collaterally, the appointment of a receiver of corporate assets in which his interest was the equity of a stockholder because he was represented in his interest as such stockholder by the presence of the corporation. But as to the order of assessment he was not before the court, and it was held not necessary that he should be there at all, because it was not necessary that he should be before the directors when they were making calls. There is no intimation that the payee of his obligation was representing him in his individual capacity as a party to the contract.

The purpose of this suit is to recover from defendant, assets, which it is alleged he is withholding from the plaintiff. As regards creditors, there is no distinction between a demand against a stockholder on his subscription and any other assets which may form a part of the property of the corporation. *Sanger v. Upton*, *supra*; *Hawkins v. Glenn*, *supra*. If the consideration of defendant's promise had not been stock, but it had rested on some other consideration,

and was payable on the same condition, a call would be necessary as a step toward its collection, and if directors failed to make it, the court could make it. We think that in the Gray case the assessment was regarded as such a step. The court had taken possession of the corporate assets and was authorized to exercise the powers of the directors for their collection. The assessment was merely a step toward such collection, and the court directed its receiver to resort to such courts as might have jurisdiction of the parties and sue upon the contracts for the amounts assessed. It does not seem to have been regarded as a judicial sentence concluding the parties as to their individual liability. In *Bangs, Receiver, v. Duckenfield*, 18 N. Y. 592, where different rates were assessed on premium notes, the assessment was held as to a maker of a note not a party to the suit in which the assessment was made, in a point involving his personal liability, to not be such a sentence, and to have no greater force than the same act would have possessed if done by the board of directors. The contention of plaintiff in error that it has greater force and is of the nature of a judicial decision, is founded alone on the presence of the corporation in the suit. If that is so it must be because it has power to waive defendant's right as an individual. It has no such power in this State outside of court. The board of directors in making an assessment can not represent the stockholder so as to waive or in any manner affect his right to a lawful assessment. The defendant's contract amounted to a promissory note payable upon demand, being made by the board of directors. *Goshen Turnpike Co. v. Hurin*, 9 Johns. 217; *White v. Smith*, 77 Ill. 351. Ordinarily, the payee of such an obligation could not go into court and waive the demand for the maker.

Though a court may have jurisdiction of the subject-matter and of the parties to a cause, its order may be void, because it has exceeded its jurisdiction. Courts are limited in the extent and character of their judgments, and if they transcend their lawful powers their judgments are void and may be collaterally impeached. *U. S., for use, etc., v. Walker*, 109 U. S. 258; *Windsor v. McVeigh*, 93 U. S. 274;

Great Western Telegraph Co. v. Barker.

Rogers v. Dill, 6 Hill 415; Folger v. Columbian Ins. Co., 99 Mass. 267; Fithian v. Monks, 43 Mo. 502; Seamster v. Blackstock, 83 Va. 233; Anthony v. Kasey, 83 Va. 338.

In U. S., for use, etc., v. Walker, *supra*, an orphans' court, having jurisdiction of the estate of a decedent and of the person of the administratrix, and having power on her removal to settle her account and order her to deliver unadministered assets to the administrator *de bonis non*, entered judgment by which she was ordered to pay over a balance found due her from the estate and it was held to be void because the fund was not considered unadministered assets. In the case before us, there is an order reciting on the face of it facts which show that it is illegal and an arbitrary violation of individual right. It would be no less so, if it had ordered those who, by its findings, had paid in full, to pay again, or that the burden of the assessment should be borne by those over a certain age, or living in a certain county or State. If such an order is binding and conclusive against the individual stockholders, scattered, as alleged, over more than twelve States and Territories, in a suit begun and carried on by a few of their fellow-stockholders, by virtue of a fiction of law that they have had their day in court and an opportunity to show why the assessment should not be made because the corporation was there, then the courts may be easily made the instruments of fraud and injustice. The assessment in question was held void in Great Western Telegraph Co. v. Burnham, 79 Wis. 47.

But we understand that the corporation was not authorized to act for or represent the defendant as to his individual liability to it, and that the order was not intended and is not to be treated as a judgment against him, but rather as the exercise by a court of a corporate function. It is conceded that, although the Circuit Court of Cook County had defendant on the list, he might defend this suit on the ground that he did not belong there by pleading that he never signed the contract, or that it was obtained by fraud, or made in violation of law, or that the relation of stockholder was canceled before the assessment; and we see no reason why he

may not also insist upon the conditions of his contract. His promise to pay was several and individual, and if the condition that he should only pay assessments equalized between himself and his fellow-stockholders so that they should contribute ratably to the corporate assets had been written on the face of it, an order to pay in violation of that condition would not be more an encroachment upon individual as distinguished from corporate interest and right, than the order in question. The law implied that condition, and if the same thing had been written in his contract it would have been mere surplusage. If the order is to be treated as an adjudication of his individual right under the conditions of his contract, then, by the rules laid down in *Ward v. Farwell, supra*, he would have been a necessary party to the suit where it was made. It is immaterial whether the assets which he is charged with withholding from the plaintiff consist of money or chattel property. The right claimed by him is personal. But treating the order merely as the exercise of a corporate function and a step in the collection of the assets for the purpose of maturing the obligation, he was not a necessary party, and it was so held and the order so treated in the *Gray* case. The court there said that a court of equity might make the order in place of the directors, citing *Glenn v. Saxton*, 68 Cal. 353. In that case the question was presented whether a call so made was a judgment or decree of the court, and it was held not to be, and it was said that the call made by the chancery court was the same in effect as if made by the president and directors of the corporation. Accordingly the action thereon was held to be barred by a two years' statute of limitations, when it would not have been barred if the call could be considered a judgment or decree of a court.

While there are cases in which it has been held that the corporation represents a member in his contract relation to it so as to bind him to a personal liability by an unlawful assessment, in violation of his contract, of which *Lycoming Fire Ins. Co. v. Langley, supra*, is an example, in almost all

cases where an assessment has been in question, it has been entirely legal and in accordance with the stockholders' contract, and the only question was whether the court could make it in place of the board of directors and in the absence of the stockholders. In those cases it has often been said that the stockholders in their relations as stockholders are represented by the corporation; but we do not think that in the just character of that relation the several personal liability of the stockholder to the corporation or its creditors is embraced. The stockholder, by becoming a member of a corporation, agrees that his interest as such shall be managed by the corporation. The rendition of judgments against it may extinguish the value of his interest, and yet he has no right as a stockholder to appear and defend for it in suits. So a few stockholders may file a bill against the corporation and without notice to their fellow-stockholders; claims may be proved in the course of the litigation against the corporation which bind the other stockholders, because they are against it in matters submitted to its management. The stockholder can not question the necessity or advisability of an assessment to pay such claims. To do so would be to question the allowance of the claims or judgments themselves. But our Supreme Court has never said that in respect to any individual liability to pay or contribute to the payment of them the stockholder is represented by the corporation, and in the eye of the law before the court by its presence.

It is also urged that the matters in controversy here became *res judicata* by the decision in the Gray case. The declaration demurred to in this case makes no averment about Gray's case. But if the defendant's rights have been settled by the defeat of Gray in his case, it must be because Gray represented him in some way. That would certainly be carrying the rule too far.

Counsel also insists, with much earnestness, that everything is to be regarded as decided against Gray touching the merits of the declaration and the order of assessment which could have been decided against him if presented to the

court and passed upon, and that we are bound to so regard the question raised in this case. The question involved here might, perhaps, have been raised in that case, but the doctrine of *stare decisis* embraces nothing except questions decided, and as the question was not raised there was no decision on it for us to stand by. So far as the decisions of our Supreme Court afford us any light on the question they lead to the conclusion at which we have arrived, that the assessment was void and the demurrer properly sustained. The judgment will be affirmed.

Eliza J. Richards v. Fidelia Baumgart.

1. **SLANDER—***Variances Between the Proofs and the Pleadings.*—Where the allegation was, "they go along on the sidewalk by our house and try to get Otho after them," and the proof was, "they go along the sidewalk by our house and try to get Otho to go after them," *it was held* to be an immaterial variance.

2. **SAME—***Proof of a Part of the Charge.*—Torts are divisible, and in slander a plaintiff may prove a part of his charge and recover if there be enough proved to constitute the slander.

3. **VARIANCES—***May be Obviated by Amendment.*—Where the proof does not correspond with the allegation of the declaration, the difficulty may be obviated by amending the pleadings to fit the proof.

Memorandum.—Action for slander. In the Circuit Court of Woodford County; the Hon. NICHOLAS E. WORTHINGTON, Judge, presiding. Declaration in case; plea, general issue; trial by jury; verdict and judgment for plaintiff; error by defendant. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 18, 1894.

**BRIEF FOR PLAINTIFF IN ERROR, WINSLOW EVANS, ATTORNEY;
B. D. MEEK, OF COUNSEL.**

The general rule as to variance is that the allegations of the pleading and proof must correspond, otherwise there is a variance. Newell on Slander and Libel, 804, 805, 808, 809; Townshend, S. & L., Sec. 363.

It is not sufficient to prove the substance of the charge merely. Rex v. Berry, 4 T. R. 217.

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In actions for defamation the material and actionable words must be proved strictly, as they are alleged in the declarations. It is not sufficient to prove equivalent words. Newell on Slander and Libel, 804.

There seems to be no rule better settled than that to authorize a recovery in slander, the plaintiff must prove the words alleged, or as much of them as will establish the slander charged. Other words of like import and meaning will not suffice. Nor is it sufficient that equivalent words or expressions are proved. Wilborn v. Odell, 28 Ill. 456.

The plaintiff must prove enough of the words to amount to the substance of the charge, and this must be done by proof of the identical words laid. Equivalent words, or words of the same import, will not do. Albin v. Parks, 2 Brad. 576; Sword v. Martin, 23 Ill. App. 304; Newell on Slander and Libel, 804, 805, 808.

BARNES & BARNES, attorneys for defendant in error; J. A. BRIGGS, of counsel.

MR. JUSTICE CARTWRIGHT DELIVERED THE OPINION OF THE COURT.

Defendant in error, a girl seventeen years old, brought suit by her next friend against plaintiff in error to recover damages for alleged slander in charging her with unchastity. A trial resulted in a verdict for the plaintiff, and judgment was rendered thereon for \$1,500 damages and costs.

At the trial certain answers of witnesses as to language used by defendant were objected to on the ground of variance from the words charged in the declaration and the objections were overruled. In one instance the words charged were, "they go along on the sidewalk by our house and try and get Otho after them," and the answer was, "they go along the sidewalk by our house and try to get Otho to go after them;" and in another instance the words charged were: "I have seen enough of what is going on in that house," while the answer was, "I have seen enough going on in that house." It is claimed that in each case there was

a fatal variance. In one case the witness added the words "to go" which were not found in the declaration, but they did not alter the sense of the words charged and in such a case the fact that fewer words were charged than spoken did not constitute a variance. *Spencer v. Masters*, 16 Ill. 405. In the other case the witness omitted the words "of what is," which were contained in the declaration, but there is no rule which requires a plaintiff to prove all the words alleged, if enough of such words are proved to constitute the charge. Torts are divisible, and in slander, a plaintiff may prove a part of his charge and recover, if there be enough proved to constitute the slander. *Wilborn v. Odell*, 29 Ill. 456. The words of the witness were the same as were charged in the declaration, and the omitted words did not change the meaning, inasmuch as to see anything going on in a house is to see what is going on there.

Another objection on the ground of variance was that the words alleged were "they are strumpets, and the youngest is no better than her mother and the older one, and they are kept there for that purpose," while the witness stated the language used to be "they are strumpets, and the youngest is no better, and they are kept there for that purpose." If there was any force in the objection it was obviated by an amendment of the declaration made at the time. The amendment is not in its proper place in the transcript, being in the bill of exceptions, but it sufficiently appears that it was filed in the case. It is urged that the amendment was not effective because the words omitted by the witness were to be stricken out at the character "B," and no such character appears in the declaration. The words appeared but once in the declaration, and there being but one place where they could be stricken out, they were sufficiently designated without the character. Objection is also made because the plaintiff testified that when defendant made the above statement concerning the youngest she pointed to the plaintiff as the youngest, and the court refused to exclude such testimony. Whether it was right or not to permit plaintiff to say with what meaning defendant pointed to her, no harm was done to defendant as there was no dispute that plaintiff

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was the youngest and that if the statement was made it referred to her.

It is argued that the second instruction given at the request of plaintiff would permit the jury to put together different statements made in different conversations and thereby make out a charge of unchastity, and that it should have been limited to one conversation or statements heard by one set of persons. The evidence introduced related to but one conversation which was all heard by the same persons, and therefore the instruction could not have had the effect suggested.

The defendant asked the court to give four instructions, in each of which some expression of defendant as testified to on the trial was separated from the rest of the conversation and a rule stated as to such expression alone. The court modified the instructions so asked by connecting the statements of defendant in each with the rest of the conversation upon the question whether it amounted to and was understood to charge plaintiff as alleged in the declaration. The occasion of the words and their connection with the rest of the conversation should be considered, and the modifications were necessary and proper.

We see no error in the record and we do not think that the verdict is against the weight of the evidence. The only plea was the general issue and the preponderance of the evidence on the issue made by that plea seems to be clearly with the plaintiff. The amount of damages allowed was not unreasonable under the circumstances. The judgment will be affirmed.

**Tola Rall v. Ed. Donnelly, Levi Perce, John R. Lamb,
Robert Davidson, Anthony McAllister, Jasper
N. Johnson, August Westphal and
John L. Phillips.**

1. **LIBEL**—*Statements in Affidavits.*—A witness is protected against a suit for defamation of character as to his testimony given on the trial of an issue before a court, and a person making an affidavit to be used

before a court in opposition to a motion for temporary alimony in a divorce suit is entitled to the same privilege.

Memorandum.—Action for libel. In the Circuit Court of Jo Daviess County; the Hon. JOHN D. CRABTREE, Judge, presiding. Judgment for defendants on demurrer to plea; error by plaintiff. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 13, 1894.

COPY OF THE AFFIDAVIT IN QUESTION.

STATE OF ILLINOIS, }
Jo Daviess County. } In Justice Court.

We the undersigned being first duly sworn deposes and says that We have known Mrs. Tola Rall Wife of Fred C. Rall of Hanover Ill for a number of yrs. Would further depose and say that she has not been a resident of Hanover Ill for the two yrs last past. that prior to that time she had been considered by the people of Hanover as a Woman of Lewd character unfit to be the Wife of any Man.

Affiant would further state upon Information and belief that she is nothing more than a common prostitute that the people of Hanover would not tolerate her actions here any longer. Furthermore that it would be a great Injustice to compel her Husband F. C. Rall to pay alimony or solicitors fees in any suit he may have pending in the courts for a dissolution of their Marriage Contract.

BRIEF FOR PLAINTIFF IN ERROR, HENRY W. MONTROSE,
ATTORNEY.

If the duty to speak or publish is not imperative, it is only a moral or social duty of imperfect obligation; the case is conditionally privileged. But, in all cases, the privilege springs from a duty to speak or publish, and is dependent upon it. When there is no duty there is no privilege. Cooley, Const. Lim. (2d Ed.), 425; Cooley on Torts, 210 *et seq.*; 13 Am. and Eng. Ency. of Law, 403-5.

The case of a witness in judicial proceedings is an illustration of the case of absolute privilege so long as his testimony is pertinent and material. But he must "not wander from the case in giving his testimony, and abuse his privilege by

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testifying to that which is impertinent and immaterial, and which has not been called out by questions of counsel." Cooley on Torts, 211; Newell on Slander and Libel, 424, 425.

An answer to a bill in chancery from information, hearsay and belief can not be used as evidence, except perhaps where the facts answered by the defendant against his interest are from information, and he states additionally that he believes them to be true. *Arline v. Miller*, 22 Ga. 330.

In determining the question of temporary alimony only two questions were at issue: (1) the wife's needs, and (2) the husband's financial ability. The wife is entitled, as a matter of right, to the necessary means to defend herself against her husband's suit. They are a common law "necessary." *Harding v. Harding*, 144 Ill. 588; *Millowitsch v. Millowitsch*, 47 Ill. App. 357; *Petrie v. People*, 40 Ill. 334.

The husband being complainant, he could not even present affidavits as to his wife's means and his faculties. 1 Am. and Eng. Ency. of Law, 474.

Even if the husband had charged adultery, the court would not have heard the affidavit set forth in the plea on the question of temporary alimony. *Puterbaugh's Ch. Pr. and Pl.* (2d Ed.), 518; *Burgess v. Burgess*, 25 Ill. App. 525.

Had it done so, it would have been error. *Burgess v. Burgess*, *supra*.

Affidavits can not be used as evidence upon a material question at issue. 1 Am. and Eng. Ency. of Law, 314, and cases cited; *Taylor v. Irwin*, 94 Ill. 488.

BRIEF FOR DEFENDANTS IN ERROR, D. & T. J. AND J. M.
SHEAN, ATTORNEYS.

Statements in judicial proceedings believed to be pertinent are not actionable. Newell on Slander and Libel, 425; 13 Am. & Eng. Encl. of Law, 406-408.

It makes no difference whether the charge is sufficient to effect its legal object or not. *Hartsock v. Reddick*, 6 Black. 256.

It is not material whether it is sufficient to effect its object or not if made in the due course of a legal or judicial proceeding. *Strauss v. Meyer*, 48 Ill. 385.

Affidavit, filed in legal proceeding, if pertinent and material, is sufficient defense to action for slander, as privileged. *Newell on Slander and Libel*, 424-425; *Spaids v. Barrett*, 57 Ill. 291.

Communication to board of supervisors privileged. *Young v. Richardson*, 4 Brad. 364.

Petition to circuit judge must be shown to be malicious. *Whitney v. Allen*, 62 Ill. 472.

It is not for witnesses to determine whether the matter is material or not. *Calkins v. Sumner*, 13 Wis. 195.

"The question of fact whether the words were spoken under such circumstances that the defendant had reason to believe and did in good faith believe that it was necessary for him to repeat the charge should have been distinctly submitted to the jury." *Allen v. Crofoot*, 2 Wend. (N. Y.) 516.

In communication such as this the plaintiff must show actual malice and want of probable cause. *Newell on Slander and Libel*, 406-407; *Howard v. Thompson*, 21 Wend. (N. Y.) 219.

In determining what is pertinent much latitude must be allowed to the judgment and discretion. *Hoar v. Wood*, 3 Metc. (Mass.) 197.

A complaint to the grand jury containing a charge of perjury is not a libel, although before its presentation to them it was exhibited to various persons by whom it was signed. *Newell on Slander and Libel*, 449; *Kidder v. Parkhurst*, 3 Allen (Mass.), 393.

If one who lost goods by theft goes to the house of the person whom he suspects to have stolen them, and there, in reply to questions put as to the object of his visit, accuses that person of the theft, the statement is privileged. *Brow v. Hathaway*, 13 Allen (Mass.) 239.

A report made by grand jurors to the District Court, imputing to an officer misconduct in office, is not a privileged communication; but when made in good faith and in the belief that it came within the discharge of their duty, is not actionable. *Newell on Slander and Libel*, 459; *Rector v. Smith*, 11 Iowa, 302.

A privileged communication means nothing more than that the occasion of making it rebuts the *prima facie* inference of malice arising from the publication of matter prejudicial to the character of the plaintiff. Newell on Slander and Libel, 494-495; White v. Nicholls, 3 How. (U. S.) 287.

MR. JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

The plaintiff in error sued the defendant in error in an action on the case for libel for publishing the following words, to wit: That is to say, "She is nothing more than a common prostitute."

The declaration contained two counts, one without and one with innuendo. Besides the general issue, defendants in error pleaded by their second special plea that the plaintiff's husband had begun suit in the Circuit Court against her for divorce, averring in the plea that the plaintiff in error had made application to the court in the divorce suit for temporary alimony and solicitor's fees, which her husband was resisting; that defendants in error were informed by her husband that he was directed by his counsel to procure such an affidavit as is set out in the plea, and that the facts set out therein were pertinent and material to the issue between the plaintiff and her husband on the question of temporary alimony; that believing the said matters were pertinent and material to such issue, they made and subscribed the affidavit in question, before a justice of the peace, containing, among other things, the following statements, to wit: "Affiant would further state upon information and belief that she is nothing more than a common prostitute."

The plea further averred that the said affidavit was sworn to in good faith, without malice, for the sole purpose of filing the same in said court, and to be used in the judicial proceeding therein mentioned, bearing on the question of temporary alimony, with a full and sincere belief that the matters set forth in the affidavit were true and pertinent to the issue to be determined by said court in said application for temporary allowance; that for said purpose it was delivered to plaintiff's husband and was filed by his counsel in

the Circuit Court and presented to such court in resistance to plaintiff's application for alimony and attorney's fees in the course of hearing.

The plaintiff in error demurred generally to this plea.

The court, upon hearing, overruled the demurrer, and plaintiff in error abiding her demurrer, the court gave judgment in bar against her on the plea and for costs.

We are of the opinion that the court below committed no error in overruling the demurrer to the second plea. The plea sets up facts which show that the affidavit containing the supposed libelous matter was uttered and published on a lawful occasion. A witness is protected against suit for defamation of character as to his testimony given on a trial of an issue before a court, and we see no good reason why a person making an affidavit to be used before a court in opposition to a motion like the one made in the divorce suit mentioned in the plea should not also be protected. Affidavits of this kind are permitted to be used on such hearings according to the practice in our courts in such cases. The suitor may legally file and use them as evidence on the hearing of such motions if he does so in good faith and with an honest purpose in furtherance of his defense. Such suitor would certainly be privileged in the use of the affidavit, and it would follow that the maker of the affidavit would likewise be protected. He could not be regarded as a mere intermeddler intruding his statements where they were not justified, as is contended by counsel for plaintiff in error. The law and practice of our courts sanctions the use of such affidavits, and it would be an unreasonable rule of law that would not protect the maker of the affidavit, where it was made in good faith, in a matter pertinent to the issue and without malice. We are of the opinion that the plea shows the affidavit to be one which the law sanctions, at least as *prima facie* privileged. The truth of the plea was admitted by the demurrer. Plaintiff in error should have taken issue on the material averments of the plea. If the averments of the plea were true, there would be no cause of action, the charge of malice, the gist of the action, being

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entirely rebutted by the averments in the plea. To maintain an action on appellant's part, under the allegations of the plea, she must show express malice and want of probable cause. *Clark v. Sumner*, 13 Wis. 193; *Ham v. Blanchard*, 5 John. R. 508; *Hayward v. Thompson*, 21 Wend. 319; *Rector v. Smith*, 11 Iowa 302; *White v. Nichols*, 3 How. 287; *Whitney v. Allen*, 62 Ill. 472; *Straus v. Meyer*, 48 Ill. 385; *Spaids v. Barrett*, 57 Ill. 291; *Young v. Richardson*, 4 Ill. App. 364.

Seeing no error in the record, judgment is affirmed.

 Modern Woodmen of America v. Henrietta L. Hoover.

1. **WAIVER**—*What Acts Amount to, Not a Question for a Jury*.—The question as to whether certain acts of the officers and agents of a mutual benefit association amount to a waiver of its rules and regulations in regard to statements required in applications for membership, is a question of law and not of fact for the determination of a jury.

2. **VERDICTS**—*Entitled to Respect upon Questions of Fact*.—The findings of a jury upon controverted questions of fact are entitled to, and receive at the hands of the courts, the greatest respect, but the opinions of jurors upon questions of law do not stand upon the same footing.

Memorandum.—*Assumpsit*. In the Circuit Court of Peoria County, the Hon. THOMAS M. SHAW, Judge, presiding. Declaration on a certificate in a beneficiary association; trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1894, and reversed with a finding of facts. Opinion filed December 13, 1894.

APPELLANT'S BRIEF, WINSLOW EVANS AND J. W. WHITE,
ATTORNEYS.

A waiver has been defined to be the relinquishment or refusal to accept of a right. An estoppel is the preclusion of a person from asserting a fact, by previous conduct inconsistent therewith on his own part or the part of those under whom he claims, or by an adjudication upon his rights which he can not be allowed to call in question. *Bacon on Life Insurance*, Sec. 420.

The terms "estoppel" and "waiver," though not technically identical, are so nearly allied, and as applied in the law of insurance so like in consequences which follow their successful application, that they are used indiscriminately by the courts. Bacon on Life Insurance, Sec. 421.

Waiver is merely equitable estoppel or estoppel *in pais*. In order to work such a result there must be a change of conduct by the insured, induced by the insurer, in order to prevent the insurer from setting up his defense.

An estoppel arises when the insurer, having full knowledge of the facts of a breach of the conditions of the contract of insurance entitling it to forfeit the policy, nevertheless goes on and by any conduct treats the contract so that the insured is led to believe and act on the belief that the contract is still in force. May on Insurance, Sec. 505 to 507; Mutual Life Insurance Co. v. Ammermann, 119 Ill. 336.

Both the assured and the underwriter must understand that there is a waiver of the conditions in order to make it operative. The understanding of one party without sufficient cause given by the other, is not enough. Hambleton v. Home Ins. Co., 6 Biss. (U. S. C. C.).

The acts or declarations or course of dealing relied upon as a waiver, must have been with full knowledge of all the facts. Bliss on Life Insurance, Sec. 267.

There can be no waiver in the absence of a complete knowledge of all the circumstances; and the fact that the assured, during the life of the policy, notified the company that the premises were vacant, and received a reply "all right," will not amount to an estoppel, unless it also appears that the company were made aware that the house was vacant a month before the policy was issued and had continued so ever since; good faith and fair dealing required that all the facts should have been stated. Boyd v. Insurance Co., 90 Tenn. 212.

A party will not be estopped by conduct or declarations obtained from him by cunning or falsehood. Coari v. Olsen, 91 Ill. 273.

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These general principles are made doubly binding on he assured in this instance by his relation. He becomes at member of the corporation by the act of insurance, and therefore bound to become informed of its rules and regulations. *Mitchell et al. v. Lycoming M. Ins. Co.*, 51 Pa. St. 402; *St. Hackney v. Alleghany Mutual Ins. Co.*, 4 Barr. (Penn.) 185.

It is clear that a member of the company is chargeable with notice of all the by-laws of the company and of the conditions of insurance adopted by the company, whether contained in the by-laws or in the resolutions. *Miller v. Hillsborough Fire Association*, 42 N. J. Eq. 460; *Hales v. Mechanics Ins. Co.*, 6 Gray (Mass.) 169; *Baxter v. Chelsea Mutual Fire Ins. Co.*, 1 Allen (Mass.) 294; *Mulrey v. Shawmut M. F. Ins. Co.*, 4 Allen (Mass.) 116.

APPELLEE'S BRIEF, ISRAEL C. PINKNEY AND STEVENS &
HORTON, ATTORNEYS.

Examples of waiver and estoppel on the part of the company by the issuance of a policy with knowledge of facts which otherwise would vitiate it, are where delivery is made without insisting on the provisions requiring pre-payment of the premium, or when it is known that the statements in the application are untrue. *Home Mut. F. Ins. Co. v. Garfield*, 60 Ill. 124; *Witherell v. Maine Ins. Co.*, 49 Me. 200.

An association knowing that certain statements in an application for membership are false if it continues to receive assessments from the assured will not be permitted afterward to declare the policy forfeited for this reason. *Excelsior M. A. O. v. Riddle*, 16 Cent. Law Jo. (Ind.) 407; *Illinois Masonic, etc., v. Baldwin*, 86 Ill. 482; *Masonic, etc., v. Beck*, 77 Ind. 203; *Home Mutual F. Ins. Co. v. Garfield*, 60 Ill. 124; *Witherell v. Maine Ins. Co.*, 49 Me. 200.

Where the insurer knows of a fact for which he might cancel policy, remains silent, collects and retains premiums, etc., he is estopped to deny liability in case of loss. 4 Brad.

485; *N. British Ins. Co. v. Steiger*, 26 Ill. App. 229; *Germany F. Ins. Co. v. Hick*, 23 Ill. App. 281; *Williamsburg F. Ins. Co. v. Cary*, 83 Ill. 453; *Reaper Ins. Co. v. Jones*, 62 Ill. 458; *Lycoming Ins. Co. v. Robert R. Barringer*, 73 Ill. 230; *Home Ins. Co. v. Wood*, 47 Kan. 521; *Rivara v. Queen's Ins. Co.*, 62 Miss. 720.

An estoppel in cases of this kind is also established by the insurer accepting assessments after knowledge of an infirmity, which would avoid the policy if insisted upon before loss occurs. *Mutual Life Ins. Co. v. Ammerman*, 16 Brad. 528; 119 Ill. 329.

Where the insurer knows of a fact for which the policy might be canceled, and continues to receive premiums from the insured, in case of loss, it would be a fraud to permit the company to avoid payment, by urging such fact as a defense. *Atlantic Ins. Co. v. Wright*, 22 Ill. 463; *Conn. Ins. Co. v. Spankneble*, 52 Ill. 57.

Notice to canvassing or soliciting agents of the company bind it. *Shimp v. Cedar Rapids Ins. Co.*, 26 Ill. App. 254; *Liverpool Ins. Co. v. Van Os*, 63 Miss. 431; *Heath v. Springfield F. Ins. Co.*, 58 N. H. 414; *Hamilton v. Aurora F. Ins. Co.*, 15 Mo. App. 59; *Redstrake v. Cumberland Mut. F. Ins. Co.*, 44 N. J. L. 294.

Notice to the general agent is notice to the company. *Peck v. New London Mut. Ins. Co.*, 27 Conn. 575; *Union Mut. Life Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222; *Continental Life Ins. Co. v. Thoena*, 26 Ill. App. 495; *Phoenix Mut. Life Ins. Co. v. Hinesley*, 75 Ind. 1.

The application of this rule also comprehends knowledge acquired of facts after the execution of the policy, which, unless waived, would avoid it. *Manhattan F. Ins. Co. v. Weill*, 29 Gratt. (Va.) 389; *Peoria, Marine and F. Ins. Co. v. Hall*, 12 Mich. 202; *McGurk v. Metropolitan Life Ins. Co.*, 16 Atl. Rep. 263.

MR. JUSTICE CARTWRIGHT DELIVERED THE OPINION OF THE COURT.

This suit was brought by appellee against appellant to recover the amount of a certificate of membership issued by

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appellant July 1, 1890, to her husband, Isaac L. Hoover, providing for the payment to appellee of \$2,000 at his death. He died December 28, 1891, leaving appellee his widow and beneficiary. The case was tried three times in the Circuit Court, and on each occasion a verdict was returned in favor of appellee for the full amount named in the certificate, with interest to the date of the verdict. The court set aside the first and second verdicts as being against the evidence, but denied a motion to set aside the third verdict and for a new trial, on the ground, as appellee states, that two new trials had already been granted and that the limit of the statutory power of the court in that respect had been reached. Judgment was therefore entered on the verdict.

The defendant by special plea averred that the certificate was issued to Isaac L. Hoover subject to all the conditions on the back of said certificate and named in its fundamental laws and by-laws; that by the conditions of the certificate it was provided that it was issued in consideration of the representations and agreements of said Isaac L. Hoover, and that if any of the statements and declarations in the application for membership, and upon the faith of which said certificate was issued should be found in any respect untrue, the certificate should be null and void, and all moneys paid and all rights and benefits on account of said certificate should be absolutely forfeited; and that it was provided by said fundamental laws, that a person to become a member of the defendant fraternity must be over the age of eighteen years and under fifty-one years of age; that said Isaac L. Hoover in and by his said application, on the faith of which said certificate of membership was issued, falsely and untruthfully represented to the defendant that he was born on the 11th day of September, 1839, whereas, in truth and in fact, he was born on the 11th day of September, 1830; that he was not eligible to become a member, and that said certificate by reason of the premises became absolutely forfeited and null and void.

There was no traverse of the facts so alleged in said plea,

but the plaintiff, by replication, set up a waiver of such misrepresentations and forfeiture, and upon the question whether there was such a waiver, issue was formed and tried.

As the pleadings stood it was admitted by the plaintiff that the deceased was not eligible to membership or to receive the certificate; that he falsely represented that he was born on the 11th day of September, 1839, when in fact he was nine years older than he represented, and that such false representation rendered the certificate null and void unless the defendant had waived its rights in that regard. That there was such waiver the plaintiff assumed the burden of proving.

The supposed waiver was claimed to have arisen out of the information given by Isaac L. Hoover, who was a doctor living in Peoria, to J. H. Boutin, who had been commissioned by J. C. Root, head consul of the defendant, to organize a local branch or camp, as it was called, of the order in Peoria. The evidence as to such information consisted of the testimony of said Boutin and one Richard Gray who was about the doctor's office. The testimony of Gray was emphatically contradicted, and judging it as it appears in the record, was entitled to little respect. His pertness and inconsiderate answers show but slight appreciation of his responsibility as a witness; but assuming that the jury might believe him as against the contradictory testimony, the entire evidence as to such information was, that Boutin solicited Hoover to become a member of the camp, and Hoover was informed as to the condition of membership dependent upon age, and that he told Boutin that he was too old and that he didn't know whether he was fifty or fifty-one at his last birthday. The outside limit given by him as his age, if he said he was too old, was fifty-one years. There was no evidence tending to prove that Hoover at any time stated his true age, which was fifty-nine years. He made out the application in which he wrote the date of his birth as "September 11, 1839," and delivered the application to Boutin, who sent it to the head physician of defendant. Boutin wanted Hoover for examining physician

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of the local camp, and had solicited his membership with that view. When Boutin sent the application he wrote that the applicant was a nice appearing man; that he did not appear as old as stated in the application; that the applicant guessed that he was fifty-one at his last birthday; that he thought the applicant a good risk, and that he would like to have him for examining physician. Boutin received a reply in which it was said, that according to the application that Hoover had made out, he was not yet fifty-one, from which it would appear that the officers of defendant supposed the application true, and that he was eligible to membership.

But if it should be conceded that the officers of the defendant who issued the certificate, knew that Hoover was not under fifty-one years of age, and therefore not eligible to membership, the alleged waiver was not proved.

It is not necessary for us to decide whether officers of a society like defendant, without being authorized, could waive its fundamental laws relating to the substance of the contract, in favor of one chargeable with notice of such laws by admitting a person not qualified and subjecting his associates to the payment of assessments on account of his death, in violation of such laws governing the relations of members to each other, since there was no waiver of a right to object to the validity of a certificate issued to Hoover when fifty-nine years old, for the reason that there is not the slightest cause to suppose that any agent or officer of the defendant ever knew that such was his age. Surely knowledge of the fact was necessary to a waiver of a right dependent on that fact. It is argued that it could make no difference, so far as the rights of the defendant are concerned, whether Hoover was one year or ten years older than the limit as to age fixed by the by-laws, but the argument is plainly erroneous. If the power existed to waive the condition, the officers might be willing to waive it as to a person fifty-one years old, in which case the increased risk would be comparatively slight, when they would not entertain the idea for a moment of taking the risk if the cer-

tificate was nine years nearer pay day and the expectancy of life correspondingly decreased.

It is urged that the judgment should not be disturbed because the intelligent, impartial, disinterested and unprejudiced gentlemen who composed three different juries settled the right of recovery affirmatively. The findings of any jury upon controverted questions of fact are entitled to and receive at the hands of the courts the greatest respect, and are not to be set aside for slight cause, but the opinions of jurors as to the law do not stand upon the same footing. The only question in this case was the one of waiver, and whether certain acts amounted to a waiver, was a question of law for the court to determine, and not for the jury, who could only say whether such acts as in law could constitute a waiver had been proved. *Winnesheik Ins. Co. v. Schneller*, 60 Ill. 465; *Henkins v. Miller*, 45 Ill. App. 34. The last jury were fully and plainly instructed by the court on that subject and well understood that information given by Hoover that he was too old, and that he thought he was fifty-one years old his last birthday, or that he did not know whether he was fifty or fifty-one at his last birthday, and the issue of the certificate with the information so given, would not amount to a waiver when he was in fact fifty-nine years old. There was no evidence tending to prove that he ever gave any information different from that stated in the instructions, or tending to prove any fact that would take the case out of the rules of law given to the jury by the court. They could only arrive at the verdict returned by deciding the questions of law adversely to the court, and as we agree with the court on those questions we feel compelled to set aside the judgment. The judgment will be reversed.

FINDING OF FACTS TO BE INCORPORATED IN JUDGMENT.

We find that the only cause of action in this case is upon the certificate issued by defendant to I. L. Hoover, and mentioned in the first amended count of the declaration, and which was admitted by plaintiff in the pleadings to have

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been null and void by reason of false representation of said I. L. Hoover as to his age, unless the defendant had waived the conditions of said certificate and its fundamental laws in that regard by issuing said certificate with notice of the age of said I. L. Hoover, and we find that the defendant had no notice or information at any time of the true age of said I. L. Hoover, or of the date of his birth, and there is no evidence that said I. L. Hoover or any other person gave any information to defendant at or before the issuing of said certificate that said I. L. Hoover was born on the 11th day of September, 1830, and that he was fifty-nine years old when he made the application for said certificate, and that the defendant did not issue the certificate with notice of the facts as to his age.

**Cora M. Seacord et al., Administrators of Estate of
Timothy Moshier, v. Asa A. Matteson.**

1. **STATUTE OF LIMITATIONS—*Open Accounts and Mutual Dealings.***—On the trial of a claim on an open account for services against the estate of a deceased person, it is error to admit as evidence in his behalf a note given by the claimant to the deceased in his lifetime, for the purpose of showing in connection with other evidence continuous dealings, in order to avoid the statute of limitations.

2. **SAME—*Mutual Dealings—Open Accounts.***—In order to save items of an account which are beyond the period fixed by the statute of limitations, it must be made to appear that the account is one of mutual dealings between the claimant and the party to be charged.

3. **EVIDENCE—*Of Good Faith, When Immaterial.***—On the trial of a claim against the estate of a deceased person, evidence for the purpose of showing the good faith of the claimant is immaterial and should not be admitted.

4. **PAYMENT—*Where the Presumption of, Arises.***—Where a person presents a claim against the estate of a deceased person for services rendered during many years, for which no demand was made of the deceased, and against the greater part of which the statute of limitations had been allowed to run, and during the period covered by such services the claimant borrowed a large sum of money from the deceased and paid interest thereon to his death, a strong presumption arises that the claimant has been compensated for his services in some way by the deceased, or that he did not at the time such services were rendered intend to charge for the same.

Memorandum.—Claim in Probate. In the Circuit Court of Knox County, on appeal from the Probate Court of said county; the Hon. ARTHUR A. SMITH, Judge, presiding. Trial by jury; verdict and judgment for claimant; appeal by defendant. Heard in this court at the May term, 1894. Reversed and remanded. Opinion filed December 18, 1894.

STATEMENT OF THE CASE.

On the 6th day of September, 1890, the appellee filed his claim against the appellants, the administrators of the estate of Timothy Moshier, deceased, who died August, 1888, and letters of administration were granted September 10, 1888, by the Probate Court of Knox Co., Ill., and notice given to creditors. The claim was filed just before the two years had elapsed after the granting of letters of administration, and was sworn to by appellee, and was, as stated in the claim and affidavit, for "legal services," rendered by appellee "in matters arising from time to time in and about the law suits, money loanings and general business relating to matters of said Moshier, as his attorney and agent prior to his death in 1888, said employment being continuous under an agreement with said Moshier that finally I should be well paid for said services, and which services so rendered were worth, and by said Moshier admitted to be worth, \$4,000." The affidavit attached thereto admits a credit of \$2,500, note given by appellee to deceased.

By order of the court appellee filed an amended account, as follows, viz.:

"Itemized statement filed November 20, 1890, under rule of court.

Estate of Timothy Moshier, deceased, to Asa A. Matteson, Dr.

To services rendered:

In the matter of T. Moshier v. David Shear.....	\$ 500
J. E. Frost, Admr., v. Timothy Moshier.....	400
Moshier v. Norton.....	1,000
Harding v. Giddings.....	200
Last will and testament.....	100
Philbrick heirs in Little Rock, Arkansas.....	100
Loans and settlement with W. S., W. S., Jr., and G.	
W. Gale.....	300

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Loans through Lombard Investment Co.....	\$ 100
Looking after and securing Ritchie loan, Beadles and Finley	50
Wooster Warren matter.....	100
Caroline Giddings matter.....	150
Hinckley and Belden adjustment.....	200
Jonas Murdock loan.....	50
Loan to Catherine Drake and Wishard Ex. title, etc.	50
Wm. Seidler, Minburn, Iowa.....	100
Loans to P. P. Johnson.....	100
S. Weston Ferris and O. C. Ferris.....	50
A. J. Finley loan.....	50
Silas Giddings matters.....	100
Numerous conveyances, Exs. of title, etc.....	100
Legal services in matters arising from time to time during my employment.....	1,000

Amendment to claim filed November 3, 1891, claiming a note of W. A. Lee for \$4,000, as set apart for claimant by deceased.

Motion by administrators for particulars composing :

Numerous conveyances.....	\$ 100
Legal services from time to time.....	1,000

On December 3, 1893, the day of the hearing, appellee, by leave of the court, after verdict and before final judgment, amended the last item by increasing it to \$2,000.

A jury was impaneled and returned a verdict for appellee for \$1,650.

On motion of the appellants for a new trial being overruled by the court, the court rendered judgment for the amount to be paid in due course of administration. From this judgment this appeal is taken.

APPELLANTS' BRIEF, THOMPSON & SHUMWAY AND J. A.
McKENZIE, ATTORNEYS.

Where improper evidence is permitted to go to the jury against objection the mischief can not be remedied by instructing the jury to disregard it. *Lycoming Fire Ins. Co. v. Rubin*, 79 Ill. 402; *Rollins v. Duffy*, 18 Brad. 403.

An administrator can not bind the estate by his admissions. *Marshall v. Adams*, 11 Ill. 41.

APPELLEE'S BRIEF, WILLIAMS, LAWRENCE & WILLIAMS AND
CLARK E. CARR, ATTORNEYS; F. F. COOKE, OF COUNSEL.

While it is true the court had no right to admit improper evidence, yet when it has inadvertently done so, and the court, as soon as the mistake has been discovered, promptly rules out the evidence, the judgment ought not, as a rule, to be reversed for such error. *Simon v. The People*, 150 Ill. 66; 36 N. E. Rep. 1019, 1021.

MR. PRESIDING JUSTICE LACEY DELIVERED THE OPINION OF
THE COURT.

On the trial, counsel objected to all evidence showing a claim of appellee dating back more than five years from the date of filing appellee's claim, thus properly interposing the five years statute of limitations. The appellee by his counsel then claimed there was a note of \$2,500 given by appellee to deceased, which he claimed as payment, and which would revive the barred claim and extend the limitations back nine years. The note bears date of September 21, 1885, and was due in one year, with eight per cent interest after November 5, 1885. The evidence shows that the services claimed for by appellee commenced as far back as 1875 or 1876, and extended till near the death of Moshier, in 1888.

It appears from the evidence that all or a greater portion of appellee's claim was barred by the statute of limitations before filing his claim against the estate of Moshier, deceased, September 6, 1890, or at least enough of it to leave that part of the claim unbarred, if any less than the amount received, even allowing the time for filing appellee's claim to have been extended by the death of Moshier one year after the expiration of the statute of limitations from the issuing of the letters of administration as provided for in Sec. 19, Chap. 83 R. S., entitled Limitations, unless the claim of appellee was revived by payment or subsequent promise.

We think there was no sufficient evidence of any payment or subsequent promise.

The court allowed appellee, against the objection of appellants, to introduce his own note of \$2,500, dated September 21, 1885, to show payment by appellee on account, or, as appellee's counsel expressed it on offering it, "to show in connection with the evidence of Randall, continuous dealings."

The court appeared to understand the object in view in offering the evidence better than it was expressed by appellee's counsel, and admitted it to show payment; for it could be of no avail to show continuous dealings to arrest the statute of limitations where there were not mutual charges on each side of the account, nor was there anything in the evidence of Randall to make it proper, for he testified to nothing about the note.

Besides this, appellee paid the interest regularly on the note from year to year, which would preclude the contention that the note merely performed the office of a receipt.

Nor could the evidence of Randall that Moshier told him on September, 1885, that he, Moshier, "expected he owed appellee enough to pay for the land that Moshier had been inquiring the value of, and appellee was proposing to buy, and that the amount asked for the land was \$2,400. Whether Moshier owed appellee or not he certainly did not pay him anything on account. He took his note and collected interest on it to his death.

The court committed serious error in permitting the note to be introduced in evidence as tending to show payment by Moshier to appellee on account, of the amount of the note given and made payable to Moshier. Nothing in the evidence could make the note competent for that purpose, and appellee disclaims any intention of introducing it by way of set-off against his own claim, conceding appellants had the right to introduce it for that purpose, or to withhold it.

And appellee further disclaims the right to regard the note as settled by this litigation but admits the appellants' right to hold it as subsisting against appellee, and does not insist that his verdict is the balance of his account allowed by the jury after giving credit for the note.

But if this verdict is allowed to stand it would be difficult, if not impossible, to determine whether the jury allowed it as a set-off against appellants' claim or whether it rejected it. But as the note was admitted to the jury as tending to show so much payment by Moshier on appellee's account, whether legally or illegally, if the judgment should be affirmed and the note held to be rightfully admitted for that purpose, the right of action on the note would be extinguished by this adjudication.

This judgment would be a bar, as verbal proof of a jurors' verdict could not be introduced in any subsequent litigation to show that they rejected the note in making up their verdict. If it is held competent as tending to show payment for arresting the bar of the statute of limitations it must be so held for all purposes.

Neither would the evidence of Randall that Moshier acknowledged indebtedness to appellee in his presence or that of William A. Lee, that Moshier told him that he intended the \$4,000 note given by said Lee to appellee and indorsed by the latter to Moshier for appellee after his death, be competent evidence to show or tend to show that the account of appellee, where the statute of limitations had run against it in whole or in part, had been revived, or the running of the statute arrested.

Neither Randall nor Leewereshown to have been Moshier's agent to collect his claim or to represent him in the matter, hence no statement made to either of them by deceased in his lifetime could be construed into a new promise to appellee to pay the debt claimed to be due after the statute had run or partly run against it.

Counsel for appellee offered in evidence an inventory of the administrators of the estate of deceased, showing the Lee note given by him to appellee, dated June 1, 1885, for \$4,000, and indorsed by him to Moshier, and containing a statement written in by appellee, who made out the inventory for the administrators, that the note was claimed by appellee. This evidence was objected to by appellants' attorneys at the time, but the court overruled the objection and admitted it, on the ground, as the judge stated at the time, "not to establish

the \$4,000 claim against appellants known as the Lee note, but for the purpose of showing, so far as it may show, the good faith on the part of appellee in presenting the Lee note against the estate." In this we think the court erred. The good faith of appellee was not an issue nor was it his right to present claims against the estate, and, failing to prove them, set himself right before the jury for having presented them. If ever so competent for any purpose, this was evidence of his own manufacturing after the death of Moshier, and neither his testimony nor statements, verbal or in writing, were competent evidence in his own behalf against the appellants, who were defending as administrators.

The letter of appellee of November 7, 1893, to H. B. Bergen, containing statements favorable to himself, was first admitted by the court in appellee's behalf and then afterward excluded by instructions.

The appellants claim to be damaged by this action of the court. While it should not have been admitted, as it was appellee's own statements favorable to himself, and against the rule of law that one may not manufacture evidence in his own behalf, it will not be necessary for us to pass on the question as to whether it was reversible error, as the judgment must be reversed for other reasons.

Appellee's services for which he claims, were performed, running for many years, and no demand ever made for them during Moshier's lifetime, and the statute of limitations has been allowed to run against a greater part or all of them, and in this time appellee borrowed a large sum of money from Moshier and paid interest on it till Moshier's death, and this would seem to raise a strong presumption that either he had been compensated in some way by Moshier, or that he never intended to make any charge for his services.

But it will not be necessary for us to pass definitely on the merits of appellee's claim or the weight of evidence to sustain it as an original claim. The errors which we have pointed out are sufficient for reversal.

For the errors above noted the judgment of the Circuit Court is reversed and the cause remanded.

Elizabeth Pyfer v. Horatio Wales, Administrator of the
Estate of Morton D. Swift, and Ambrose
Sanborn, Administrator de Bonis Non
with the Will Annexed of the
Estate of Adelia Bush.

1. MASTER IN CHANCERY—*Decision, When Final.*—Where a matter in controversy has been referred to a master in chancery and he makes his report thereon, if no exceptions are taken to the same, it must be regarded as final.

2. DEPOSITS OF MONEY AT DIFFERENT TIMES—*Presumptions as to Which is First Drawn Out.*—As a general rule when a depositor makes deposits in a bank from time to time, and also draws money from the bank at different periods, the law presumes that the deposits first in date are first drawn out.

3. SAME—*Exception to the Rule.*—Where a depositor holds money in a fiduciary character or as trustee and deposits it with his own money in bank and afterward draws out money by means of checks, the law presumes that he draws his own funds in preference to the trust money.

Memorandum.—Bill of interpleader. Appeal from the Circuit Court of Ogle County; the Hon. JAMES SHAW, Judge, presiding. Heard in this court at the May term, 1894. Reversed and remanded with directions. Opinion filed December 18, 1894.

APPELLANT'S BRIEF, J. W. ALLABEN AND J. C. SEYSTER,
ATTORNEYS.

The deposit of trust funds by a trustee in his private bank account, in which he may have deposited moneys of his own or moneys belonging to other *cestuis que trust*, does not so far destroy the identity of the funds that the *cestuis que trust* merely become a general creditor. *Rabel v. Griffin*, 12 Daly (N. Y.) 241; *Van Allen v. American Nat'l Bank*, 51 N. Y. 1; *Pennell v. Deffell*, 4 DeGex, M. & G. 372; *In re Hallett's Estate*, 13 L. R. Ch. Div. 696.

We cite the following authorities as sustaining, in a general way, the right of the beneficial owner of a fund to follow and recover the same when deposited in bank or reinvested by another, and therefore sustaining the right of the appel-

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lant in this case to recover. Independent District of Boyer v. King, 45 N. W. Rep. 908; U. S. v. State Bank, 96 U. S. (6 Otto) 30; Smith v. Combs, 49 N. J. Eq. 420.

In every such case the fair and reasonable presumption is, that the trustee used and disposed of his own assets in his own personal transactions, and retained the assets which he held in trust. Smith v. Combs, 49 N. J. Eq. 420.

Trust funds will be followed through all the ramifications of the trade of business, or if deposited in bank with private funds will be separated from the latter and given to the beneficiary. Lewin on Trusts and Trustees, Vol. 2, p. 894; 1 Perry on Trusts, Secs. 128, 447; McComas v. Long, 85 Ind. 552; Taylor v. Plummer, 3 Maule & Sellwyn 562; Rex v. Eggington, 1 T. R. 369; Sayers ex parte, 5 Vesey, Jr. 169; The Farmers & Mechanics Nat'l Bank v. King, 57 Pa. St. 202; Starr v. York Nat'l Bank, 55 Pa. St. 364; 2 Black. Com., 405; 2 Kent. Com., 364; Hart v. Ten Eyck, 2 Johns. Ch. (N. Y.) 108; Story on Agency, Secs. 205, 333; Morse on Banks and Banking (3d edition), p. 929, Sec. 590.

APPELLEE WALES' BRIEF, FRED ZICK AND FRANC BACON,
ATTORNEYS.

Where a trustee has converted a trust fund into moneys, so that it can not be separated from the latter, the beneficial owner occupies the position of a general creditor of the estate. Ill. Tr. and Sav. Bank of Chicago v. Smith, 21 Blatchf. 275.

Whenever a trust fund has been wrongfully converted into another species of property, if its identity can be traced it will be held, in its new form, liable to the rights of the *cestui que trust*. No change of its state and form can divest it of such trust. So long as it can be identified, either as the original property of the *cestui que trust*, or as the product of it, equity will follow it, and the right of reclamation attaches to it until detached by the superior equity of a *bona fide* purchaser for a valuable consideration without notice. The substitute for the original thing follows the nature of the thing itself, so long as it can be ascer-

tained to be such; but the right of pursuing it fails when the means of ascertainment fail. *Thompson's Appeal*, 27 Pa. St. 16; *Goodell v. Buck*, 67 Me. 514; *Portland and Harpwell Steamboat Co. v. Locke*, 73 Id. 270; *United States v. Inhabitants of Waterbury*, 2 Ware (U. S. D. C.) 158; *Englar v. Offutt*, 70 Md. 78; *Johnson v. Ames*, 11 Pick. 172; *School Trustees v. Kirwin et al.*, 25 Ill. 73.

As to the holdings of other courts in support of the proposition that in order to recover a trust fund the specific articles must be found, or others which are the proceeds or products of such articles, by a change which the claimant must distinctly point out, we cite the following additional references: *Story's Eq. Jur.*, Secs. 1258, 1259; *Kipp v. Bank*, 10 Johns. (N. Y.) 63; *Bank v. Russell*, 2 Dill. (U. S. C. C.) 215; *Bank v. Bank*, 15 Fed. Rep. 858; *In re Vetterlein*, 26 Id. 145; *Thompson's Appeal*, 22 Pa. St. 16; *People v. Bank*, 78 N. Y. 271; *Butler v. Sprague*, 66 Id. 392; *Ferris v. Van Vechten*, 73 Id. 120; *Van Allen v. Bank*, 52 Id. 4; *Dowes v. Kidder*, 82 Id. 121; *Allen v. Russell*, 78 Ky. 104; *Cook v. Tullis*, 18 Wall. (U. S.) 332; *Parker v. Jones*, 66 Ala. 234; *Cragie v. Hadley*, 99 N. Y. 131; *Bank v. Dowd*, 35 Fed. Rep. 340; *Lathrop v. Bampeton*, 31 Cal. 17; *Goodell v. Buck*, 67 Me. 514; *Steamboat Co. v. Locke*, 73 Id. 370; *In re Coan Mfg. Co.*, 12 Nat. Bank Reg. 203; *In re Janeway*, 4 Id. 100; *Englar v. Offutt*, 16 Id. 497; *Culham v. Stewart*, 3 Can. L. T. 550.

MR. PRESIDING JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This was a bill of interpleader brought by Barber Bros. & Co., of Polo, Illinois, making appellant and appellees parties defendant, to settle between them the title and right to have \$697.37 on deposit in their bank on account of Morton D. Swift, deceased.

The bank was the place of deposit for deceased's private funds, and in April, 1893, he received a certificate of deposit on the bank from appellant calling for the sum of \$1,295 on the Barber Bros. & Co. Bank, indorsed by appellant to

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him. At the same time he gave her a receipt, stating he had received the deposit for safe keeping. In a day or two afterward he made a deposit of this certificate in the bank on his own account and took a credit in his book of deposit for it. The credit containing this deposit was made of this certificate and three other items, and aggregated \$1,315. At that time deceased had to his credit in his bank book, \$463.12, and afterward he put in at different times sums amounting to \$1,729.61, and drew out all except the amount in controversy.

The question is whether the appellant, whose certificate of deposit made up a part of deceased's account in the bank, is entitled to that sum, or whether the administrator is entitled to it.

Ambrose Sanborn claimed a portion of the amount of the deposit remaining in the hands of the bank as the administrator of Adelia Bush, deceased, but the master in chancery found against him on his claim, and no exception was taken by him to this report, therefore the action of the court rejecting his claim must be regarded as final.

It appears also that the amount claimed by Ambrose as administrator, etc., had been drawn out by Swift, before he deposited appellant's certificate, except a claim for \$277.75, which the evidence failed to sustain as found by the court and master.

The money in question never became the property of Swift, and the certificate of deposit was indorsed to him for safe keeping only.

As a general rule, when a depositor makes deposits from time to time and also draws money from the bank at different periods, the law presumes that the deposits first in date are first drawn out by the depositor. *Devanes v. Noble*, 1 *Merivale's Reports*, 529, 572 to 620. There is an exception to this rule; where a depositor holds money in a fiduciary character or as trustee and deposits it with his own money in bank and afterward draws out money by means of checks, the law presumes that the drawer must be taken to have drawn out his own funds in preference to the trust money.

In re Halletts' Estate, 13 Law Reports, Chancery Division, 696. In the last case cited it was decided that money held in a fiduciary capacity by one who places it in bank can be recovered of the bank, although mixed with the depositor's own money, and the presumption is that the money drawn by the depositor is his own, even if the trust money and his own are in one account. Overseers Poor Norfolk Co. v. Bank of Virginia et al., 2 Gratton, 544. To the same effect are the following cases: Hall, Administrator, v. Otis, 77 Me. 122; Robel v. Griffin, 12 Daly's R., N. Y. Com. Plea. 241, and cases cited; Cen. Natl. Bank of Baltimore v. Connecticut Mutual Life Ins. Co., 104 U. S. 54, in which In re Halletts is referred to and approved. In the case above cited, the United States Supreme Court lays down the principle thus:

"This doctrine of equity is modern, only in the sense of its being a consistent and logical expression of principles originating in the very idea of trusts, for they can only be preserved by a strict enforcement of the rule which forbids one holding a trust relation from making private uses of trust property." See, also, Third Nat. Bank, etc., v. The Stillwater Gas Co., 36 Minn. 75, and the same doctrine is held in Kansas and Pennsylvania and other States. See, also, Standish v. Babcock et re, 29 Atlantic R. 327, Court of Chancery, N. J. The court below finds in its decree that the money deposited by Swift at the time the certificate of deposit was placed in the bank was immediately and at once intermingled with the certificate of deposit or the money arising therefrom and with other moneys to the credit of Swift, "and that the identity of the said money or the avails of the said certificate were not a trust fund and were not distinguishable or traceable as a separate and distinguishable fund, as the court finds said Swift had placed in open account other moneys after the said 29th day of April, 1893 (the date of the deposit of the certificate), amounting in the aggregate to \$1,729.61," and that it all had been checked out save \$697.37. The basis of the decree was that inasmuch as the certificate of deposit had been intermingled by Swift and the bank with other mon-

ey, it lost its character as a trust fund, and could not be identified as arising from the certificate, and the balance in the bank could not be identified.

We think this position is not tenable. The certificate of deposit as shown by the receipt of Swift held by appellant was placed in his hands for safe keeping. He had not the privilege to use it as his own and make himself the general creditor of appellant. He occupied a fiduciary relation to appellant as a special depositor and trustee. Swift, instead of holding the certificate separate and apart, deposited it in the bank to his own account. The fact that the certificate went into the account is clearly shown by the evidence. The question presented is, did it remain there unexpended by Swift and is the balance of his deposit account of \$697.37 the proceeds or avails of appellant's certificate. That depends on legal presumptions. And we have shown by the authorities cited that while Swift drew out a large portion of his deposit account the law holds that he drew out his own individual share first, and what remained belonged to appellant and was the proceeds of her certificate of deposit, none of which should have been expended for Swift's individual benefit. It is the same as though Swift had taken the bank's promissory note for the identical money. The contention that the indorsement on the certificate of deposit by appellee was made after the receipt given her and in pursuance of a subsequent agreement to loan the money to Swift, is not supported by the evidence.

The appellee cites and relies on the case of *School Trustees v. Kerwin et al.*, 25 Ill. 73, in support of his contention.

We think the case is not in point. That was a suit against the bank and not an attempt to reclaim the identical money. Here the bank brings the money, the proceeds of Swift's deposit of appellant's certificate, into court, and asks the court to give it to the party entitled to it by law. The bank is not claiming benefits that might accrue to it as being an innocent purchaser of the certificate, but brings

the proceeds of that certificate into court and offers it up to the rightful party, disclaiming ownership or benefit arising to itself on account of the deposit, and admits it to be either appellant's or appellee's. Allowing that this certificate at one time had been mixed up with the individual deposits of Swift in the bank so that it could not be identified, and if Swift had died before he had separated his own money from it by drawing it out, and that if Swift had then died, appellant's money could not have been identified so as to have recovered it in an action like this, it by no means follows that after Swift had identified it by drawing out his personal funds, leaving a balance in legal contemplation the proceeds of appellant's certificate, that appellant should not be awarded those proceeds. This being trust money and traced into Swift's deposit account it could be there followed even if mingled with other money of his account. *Wilson et al. v. Kirby*, Adm'r, 88 Ill. 566.

Suppose Swift had converted the appellant's certificate into money and had afterward mixed it in common mass with other funds, bills or coin, so that it could not have been identified, and had afterward taken out a portion of such bills and coin, leaving appellant's amount, and have put this amount into a sack by itself and put a tab on it, marking it as appellant's money held by him as special depositor, would not appellant have had the right to this money as against the administrator?

The money arising from the certificate could have been identified by those "earmarks" and would have been awarded to appellant in accordance with legal principles. But the case at bar is no different. The money in the hands of the bank has been clearly identified as the proceeds of appellant's certificate of deposit and it is not mixed with any other money of deceased, no portion of the general estate of Swift is mixed with it, the bank is claiming no benefits accruing to it as an innocent purchaser, or otherwise, but is willing to surrender it to the party equitably entitled to it. What principle is there in any rule of law or equity that would withhold it from appellant? The

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claim or chose in action against the bank ought to take the place of the certificate. In *School Trustees v. Kirwin et al.*, 25 Ill. 73, cited and relied on by appellees, it is laid down as a rule of law that "It is not necessary, if the trust be moneys, that the particular coin or kind of money or individual pieces shall be identified in order to pursue it, but its identity as a fund must be preserved so that it may be distinguished from all other money. It is sufficient so long as it can be followed as a separate and independent fund distinguishable from any other," and "until detached by superior equity of a *bona fide* purchaser for a valuable consideration without notice." The same doctrine is clearly held in *Wetherel v. O'Brien*, 140 Ill. 146; *Union National Bank of Chicago et al.*, 138 Ill. 184, also cited by appellee.

In the case first cited of *Trustees v. Kirwin*, *supra*, the court held that "When the money in question in that suit was received into the bank the money was mixed up with the money of the bank and its identity as a fund thereby lost" * * * "it having been mixed and confounded in a general mass of property of the bank of the same description the right to pursue it must also fail."

In that case the rights of the bank were being considered. In this case the appellant does not lose her rights to pursue her claim to recover her money by its changed form if it can be identified.

It is in the form now of money in the hands of the court, deposited there by the bank, now freed by this act from responsibility, in which appellant's certificate was deposited and the proceeds of such certificate clearly traced under the rules of law and equity, and as we think should be awarded to her.

The decree of the court below is reversed and the cause remanded with directions to the Circuit Court to award, by its decree, the money in question to the appellant, less the costs of suit.

56	454
96	241

Kankakee Electric Railway Co. v. John Lade.

1. **STREET CARS—*Frightening Horses.***—A street car company has the same right with its cars to a street that an individual with a team has, and is only bound to use ordinary care with reference to the latter's safety. It is not responsible for injuries resulting from the team being frightened at the sight of the cars, unless the company fails to use reasonable care to avoid damages after discovering the danger.

2. **RAILROAD COMPANIES—*Use of Streets.***—A railroad company with a track along a street is entitled to the use of the street equally with teams, and if horses are frightened at the cars in their ordinary operation, the company is not liable.

3. **VARIANCE—*Pleadings and Proof.***—Under a declaration describing an ordinance as requiring the servants of a street car company, in case they saw "horses approaching and they appeared frightened, to stop its cars and allow them to pass," an ordinance only requiring such servants to keep a vigilant watch for carriages, etc., etc., and govern themselves accordingly to avoid damages, is not admissible.

4. **INSTRUCTIONS—*Street Cars and Frightened Horses.***—In an action for injuries sustained by the frightening of horses by electric cars, it is erroneous to instruct the jury that if the company "by watching out could have seen the plaintiff with his team, and that the team was frightened, then it was its duty to have done what it could to avoid accident," as being too strict in its requirements.

5. **SAME—*Not to State What Acts Constitute an Exercise of Ordinary Care.***—In an action for damages sustained by the frightening of horses by electric cars, it is error to instruct the jury that when the company's servants saw the horses it was their duty to have stopped the car and allowed the horses to get out of danger, because it tells the jury what particular acts the company's servants must do in order to be within the exercise of ordinary care.

Memorandum.—Action for damages, frightening horses. In the Circuit Court of Kankakee County; the Hon. CHARLES R. STARR, Judge, presiding. Declaration in case and plea of not guilty; trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1894. Reversed and remanded. Opinion filed December 18, 1894.

WHEELER & HUNTER, attorneys for appellant.

H. L. RICHARDSON and E. E. DAY, attorneys for appellee.

MR. PRESIDING JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This was a suit in action on the case, by appellee, instituted in the Circuit Court against appellant, to recover for injuries caused, as alleged in the declaration, by appellant's car frightening appellee's horses while he was driving them across the Kankakee river bridge at Kankakee, Ill., resulting, as is claimed, in injuries to appellee. There was a verdict and judgment for appellee for \$400, from which this appeal is taken.

The declaration contained two counts, one charging negligence on part of appellant in violating an ordinance of Kankakee City, which it averred provided that appellant must stop its cars when it met a team that was frightened by their appearance and wait until the team got by, and that appellant's servants saw appellee's team approaching and neglected to stop their car, and carelessly and negligently and knowingly ran down near the appellee's horses and frightened them, causing them to run away and injuring appellee, by throwing him out of his wagon. Second count charged this duty on appellant but did not plead the ordinance.

The cause was tried by a jury, and it appeared from the evidence of appellee that he was a farmer residing near Kankakee City, and on the 15th of April, 1893, went with his team and wagon to the city to get groceries and arrived there about four o'clock in the afternoon; that when he got to the river bridge over which the cars of appellant passed, he saw one of its cars approaching, he coming from the south; that he motioned and hallooed to the defendant's servants to stop the car; that he first saw the car about four rods from the bridge right by the mill, and when he first saw it he stopped a little and drove a little further on and then came the cars about four rods from the bridge; that the car was about two rods from him when he hallooed to it; that the cars were right beside him when his horses ran away, and three of his ribs were broken, and he was ruptured and was in bed four months. The men on front of the car did not look at him when he hallooed.

It does not appear very clear from appellee's evidence whether he was on the bridge before he saw the appellant's car or not. The motorman, Patrick Powers, testified that he, in charge of the car, met appellee on the bridge with his team; that his car was not quite a span on the bridge when appellee first drove on, and when he saw appellee he was standing in his wagon, lines in one hand, that is, he had the lines doubled in his hand and had the ends of the lines in the other hand, and was continually whipping his horses, and so he stopped the car. The conductor rang the bell for him to go on and he ran the car slowly until about sixty feet of appellee, and then stopped and said to him, "Hold on and don't whip the horses and I will help you by;" but the horses were going so fast he dare not go in front of them, and just as he came to the front end of the car his team made a lunge forward, and the front wheels of his wagon struck one of the standards of the bridge and they jerked and broke the wagon tongue; it dropped down and the horses ran away. The horses trotted all the time till they came within 100 feet of him and then they commenced to gallop. Witness did not hear appellee call to him to stop. All he said was "Whoa" and "Get up." The bridge is about 1,000 feet long. The team was coming toward the car in a fast trot and looked frightened and that was the reason he stopped. Powers' testimony was corroborated by that of the conductor of the car, Ezra Dachen.

It is apparent from the evidence that appellee and the servants of appellant went on the bridge before either saw that the other was on.

The bridge is 1,000 feet long, and appellee says he called to the motorman when he was two rods away. The appellant had the same right on the street and bridge with its cars as the appellee, and was only bound to use ordinary care with reference to his safety. The appellant would not be responsible for any injuries resulting to appellee from the team being frightened at sight of the cars being operated on the streets, unless it failed to use reasonable care to avoid damages after discovering that there was danger by the fright of teams or otherwise.

It is laid down by Rorer on Railroads, Vol. 1, p. 705, that "a railroad along a street is entitled to the use of the street equally with teams, and if horses are frightened in ordinary operation, the railroad company is not liable." *Macomber v. Nichols*, 34 Mich. 214. We can not see what appellant's servants could have done that they did not, after they saw appellee's team was frightened and there was danger. They stopped the cars before the team reached them, sixty feet before, and the cause of the accident was that the horses shied when they came to the cars; they were frightened at the car while it was standing still.

The court ought not to have admitted the ordinance under the pleading. The declaration described it as requiring the appellant, in case its servants saw the horses of appellee approaching, and they appeared frightened, "to stop its cars and allow his horses to pass." The ordinance only required appellant's motorman "to keep a vigilant watch for carriages, etc., etc., and govern himself accordingly to avoid damages." In any given case, under this ordinance, the motorman was only required to use vigilance in discovering danger, and to use reasonable care to avoid it. It was not a matter of law that it was negligence *per se* if the cars were not stopped. What reasonable effort the motorman should make to avoid causing damages after seeing danger, was a question of fact for the jury. There might be circumstances where to stop the car would be to cause damage instead of to avoid it.

The appellee's first instruction is erroneous in telling the jury, that if appellant, "by watching out, could have seen plaintiff with his team, and that the team was frightened, then it was its duty to have done what it could to avoid accident."

It will be seen that this instruction was too strict in its requirements. When the appellant's servants saw that appellee's team was frightened, it was only their duty to use reasonable care to avoid injury. And this they were required by law to do. In fulfilling this obligation they would be governed by all the surroundings and circumstances of the case.

The sixth instruction is also erroneous in telling the jury that when appellant's servants "saw the plaintiff's horses were frightened, then it was the duty of the defendant company to have stopped its car and allowed plaintiff to get out of danger." This instruction was erroneous in telling the jury what particular act appellant's servants must do in order to be within the exercise of ordinary care. That was a matter of fact for the jury, and not the court, to determine. The jury, if left to decide what ordinary care on part of appellant required under the circumstances to prevent or avoid accident, may have found that it was not necessary for appellant to stop its car any sooner than it did, or that it was not necessary to stop it at all. The court, by this instruction, invaded the province of the jury. Then there is an intimation in the instruction that appellant's motorman did not stop the car, when the evidence shows that he stopped it within sixty feet of appellee's horses. The jury, if left to determine the question, may have deemed this ordinary care on the part of appellant to avoid the accident and injury to appellee. Nor is the above error excused by the court erring in the opposite direction by giving appellant's instructions seven and twelve; nor is it cured because other proper instructions were given for appellant.

For the above errors pointed out, the judgment of the court below is reversed and the cause remanded.

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100	*528

Village of Bureau Junction v. Irad L. Long.

1. CITIES AND VILLAGES—*Right to Plant Posts in Streets to Protect Sidewalks.*—A sidewalk in a city or village is a part of the public street, and it is as much the duty of the municipal authorities to keep it in repair and protect it, as it is the remainder of the street. In doing so, it is permissible to plant stones or posts in the streets, provided that they do not interfere with a reasonable use of the street by the public for travel.
2. SAME—*Duty to Keep Streets Clear—Runaway Teams.*—No duty devolves upon a municipal corporation to keep a street entirely clear from lamp posts, telephone poles, water hydrants, hitching posts and the like, so that runaway teams may have a clear way on the street from sidewalk to sidewalk.

Village of Bureau Junction v. Long.

Memorandum.—Action for damages. In the Circuit Court of Bureau County; the Hon. CHARLES BLANCHARD, Judge, presiding. Declaration in case; plea of not guilty; trial by jury; verdict and judgment for plaintiff; error by defendant. Heard in this court at the May term, 1894, and reversed with finding of facts. Opinion filed December 18, 1894.

ECKELS & KYLE and RICHARD M. SKINNER, attorneys for plaintiff in error.

BARNES & BARNES, attorneys for defendant in error; F. WHITING, of counsel.

MR. JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This is an action on the case to recover for injuries sustained by defendant in error in a runaway of his team, caused, as alleged, by the negligence of plaintiff in error, in allowing its streets to remain in bad repair and unsafe condition. There was a recovery for \$10,500.

There are three counts in the declaration. The first and second charge the negligence of the village, in allowing a large stone to remain in what is known as Bureau street, against which one of the wheels of the wagon of defendant in error came in violent contact, thereby throwing him from the wagon. The third charges negligence in allowing a public alley connecting with the street to be in such unsafe condition as to cause another team while passing from the alley into the street to become frightened and run away, which had the effect to cause the team of defendant in error to run away and upset his wagon, thereby causing the injury.

There was no evidence tending to prove the third count, but the right to recover is shown, it is claimed, by the evidence introduced to support the first and second counts.

Bureau street runs from the Chicago, Rock Island & Pacific Railroad through the village, and is a frequently traveled thoroughfare. It intersects at right angles from the west with Chicago street, an alley, Rock Island street, and another alley. At the southwest corner of Bureau and

Chicago streets is a large stone about twenty inches long, fifteen inches wide and twelve inches thick, planted there for the purpose of protecting the sidewalk at that point from wagons and other vehicles passing from one street into the other.

On the 16th of October, 1889, the defendant in error was engaged in moving his household goods from a house in which he had been living and which was located on Rock Island street. For convenience the goods were loaded into wagons in the alley above the street. There were two teams with wagons, one driven by defendant in error, and the other by a relative, Belden Long. Defendant in error drove out of the alley into Bureau street first, Belden Long following, driving a team of mules. In passing from the alley the mules became frightened, the seat and driver were thrown from the wagon, and the mules rushed down the street past the defendant in error. As the mules passed, the other team became unmanageable and run away. At or near the intersection of Chicago street with Bureau street a wheel of the wagon of defendant in error collided with some object, the wagon was upset, and the defendant in error sustained such injuries as to necessitate the amputation of both feet.

It was contended by the plaintiff below that the right front wagon wheel of his wagon struck the stone at the southwest corner with such force that the staples were pulled out from the neck yoke which let the tongue drop and which had the effect, with the speed at which the horses were running, to turn the wagon over. It was contended upon the part of the village that the wagon wheel did not strike the stone at all, but that it collided with a coal wagon which had just come out of Chicago street, and which the driver was endeavoring to get onto the east side of Bureau street out of the way of plaintiff's runaway team.

While there was a conflict in the evidence upon this disputed point, we think that a clear preponderance shows that the upsetting of the wagon was caused by its collision with the coal wagon.

We think, too, that the cause of the team of the defend-

Village of Bureau Junction v. Long.

ant in error running away was due to the carelessness of Belden Long in improperly loading his wagon or in the mismanagement of the mule team.

We are unable to discover in the evidence any ground of negligence to render the village liable. Even if it be contended that the wagon was upset by reason of the collision with the stone at the southwest corner of the streets mentioned, it is not liable. The village authorities had the right to plant the stone there for the protection of the sidewalk. It was planted in close proximity to the sidewalk and allowed ample space in the street for passing teams.

A sidewalk in a city or village is a part of the public street, and it is as much the duty of the public authorities to keep it in good repair and protect it as it is the remainder of the street. In doing so they are permitted to plant stones or posts in the street, provided that they do not interfere with a reasonable use of the street by the public for travel. No such duty devolves upon them as to keep the streets entirely clear from lamp posts, telephone poles, water hydrants, hitching posts, etc., so that runaway teams may have a clear way on the streets from sidewalk to sidewalk.

In the exercise of their judgment for the protection of the sidewalk at the point in controversy we think the village authorities acted wisely.

With the views herein expressed, it is clear the judgment should be reversed, and the case held here without remanding.

FINDING OF FACTS, TO BE INCORPORATED IN THE JUDGMENT.

This court finds that the plaintiff in error is not guilty of the negligence set up in either of the three counts of the declaration of defendant in error; that the defendant in error sustained the injury to his person set up in the declaration by reason of the running of his team and the colliding of his wagon with another wagon traveling upon Bureau street; that the plaintiff in error was in no wise responsible for such runaway or collision, and that the defendant in error has no cause of action against the plaintiff in error.

Illinois Central Railroad Co. v. Herman Winslow.

1. **ORDINARY CARE—*Negligence in a Car Repairer.***—A car repairer who goes under a car standing upon the track for the purpose of repairing it without displaying signals as required by the rules of the company, relying upon another employe to protect him from moving engines, is guilty of negligence, and can not recover of the company for an injury received while so employed.

2. **SAME—*Disobedience to Rules Intended for Safety to Employees.***—An employe of a railroad company who violates a rule designed for his protection and which would have prevented his injury if he had obeyed it, can not recover.

Memorandum.—Action for personal injuries. In the Circuit Court of Kankakee County. The Hon. CHARLES R. STARR, Judge, presiding. Declaration in case; plea of not guilty; trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1894, and reversed with a finding of facts. Opinion filed December 18, 1894.

WHEELER & HUNTER, attorneys for appellant.

EDWARD E. DAY, attorney for appellee.

MR. JUSTICE CARTWRIGHT DELIVERED THE OPINION OF THE COURT.

Appellee was a car repairer for the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, known as the "Big Four," which delivered its cars to appellant at Kankakee, Illinois, for transportation to Chicago and other points. At the junction of the two railroads at that place appellant provided a track upon which cars were so delivered to it. There were two main tracks and on each side of them were six tracks for use in that yard. The west track of all was a repair track where cars needing repairs were to be taken for that purpose. It was only connected with the other tracks at the north end and could only be entered from that direction. The second track west of the main tracks was the one on which cars were to be delivered to and received

by appellant, and was known as track number 2 on the west side. When cars were delivered by the Big Four on track number 2 they were inspected by appellant's car inspector before they were received, and any that were found out of order were rejected and marked with chalk. Those found out of order were then taken to the repair track and repaired by the Big Four, but slight repairs were made on track number 2. After being repaired they were again inspected and if found all right were received. On June 15, 1892, a car delivered by the Big Four on track number 2 was found out of order, needing two draw bolts. Appellee went under the car and was making the needed repairs on that track which was full of cars. An engine making up its train for Chicago went in at the north end on that track to get cars which it was required to take, and in its switching operations shoved the car being repaired over appellee. His leg was broken and ankle joint dislocated, and he sued appellant for the damage sustained, charging that appellant carelessly, negligently and knowingly ran the cars down to and against the car which he was repairing. There was a trial and he recovered \$5,000.

There was very little dispute about the facts. Detleff Nevey was car inspector for the Big Four, and plaintiff worked under his direction. Dominick Jonas worked with plaintiff and was called his partner. They had been working on the repair track, and when the cars were put on track number 2, at the time of the accident, and were inspected, Nevey said that they would have to go to work and fix the cars. They both asked him to have the cars taken to the repair track, and Jonas refused to go under the cars or to obey his orders. Nevey told plaintiff that this was a little job and would not take long, and that it was proper to fix it there, and plaintiff made no further objection. The rules in force in the yard provided that when employes were inspecting or repairing cars that they did not wish moved, they must protect themselves by placing conspicuously a blue signal on both ends of the car, using a blue flag by day and a blue light by night, and that, when

necessary to make repairs on a car in a train, they must place blue signals on both ends of the train before commencing work. Plaintiff was familiar with the rules, and he took a blue flag and went to the south end of the line of cars and put it in the draw bar of the last car, at that end. He then told Nevey that he had put up the flag at the south end, and had none at the north end. It appears that Nevey then said that he would go up to the north end and attend to that end or look out for plaintiff, although Nevey denies that he made such a promise, and claims that he thought the job would be done by the time he got to the north end. Plaintiff knew that it was dangerous to go under the car without having the north end of the train flagged or watched, and would not have gone under it if Nevey had not agreed to watch that end. Jonas looked after some other things and then came to the car where plaintiff was and sat on the brake beam. Finally, when plaintiff asked for help, and told Jonas that he had a flag on the south end, and Nevey had gone to the north end and would take care of that, Jonas stepped down to help, and about that time the car was pushed over plaintiff. Nevey went up to the north end and did not put up any flag, or give any heed to the dangerous situation of plaintiff or to his protection. These facts were proved by the plaintiff, and from them we can only conclude that the injury to plaintiff was due to his failure to see that the flag was put up as required by the well known rule, and his reliance upon the promise of the car inspector, Nevey, combined with the negligence of Nevey, who was not a servant of defendant, in failing to protect plaintiff.

The only reason given for the attempt to charge defendant with liability, is a claim that the engine which was making up the train, passed up from the south after the flag at the south end was up, and that the engineer might have seen it if looking in that direction, and from that fact should have known that some one was under the cars. Even if there was negligence in that regard there could be no recovery, since plaintiff was not exercising ordinary care. It is not probable from the evidence that the engine went past after

the flag was put up. It went up the west main track from twenty minutes to half an hour before the accident. The tracks were fourteen feet apart from center to center and there was but one track between the track it was on and track number 2. The engine was drawing twelve cars, and neither plaintiff, Jonas nor Nevey saw or heard it pass. Plaintiff and Jonas at least, were apprehensive of danger and likely to take notice and to remember if the engine had passed them. But if it could be maintained that the engine passed after the flag was put up, the evidence for plaintiff was that from twenty minutes to half an hour had elapsed before the car was pushed over plaintiff. But slight repairs were ever made on that track and the rule required flags at both ends. There being no flag at the north end the natural presumption would be, even if the flag had been seen so long before, that the repairs were completed and the flags removed. The evidence would not justify an inference of negligence on the part of defendant. All the negligence proved was on the part of plaintiff and Nevey.

The third instruction given for plaintiff was as follows :

The court instructs the jury that it is the duty of the defendant company in switching cars to watch out for any signals of danger; that it makes no difference whether the flag was on the south end of the train on track 2, or the north end, provided the jury believe from the evidence that at the time they ran the cars in, the employes of defendant saw the signal on the south end of the train on said track No. 2.

If the signal on the south end was or could have been seen at all it was some time before the accident, and it could not be said that it made no difference that there was none at the north end when the accident was caused. It is not a rule of law that it made no difference whether plaintiff and his co-employes violated the rule designed for their protection and which would have insured it if obeyed, or that an engineer running on one track through a yard was bound to watch for signals the various tracks in the yard with which he had no concern.

The verdict was against the evidence, and the facts proved by plaintiff clearly showed that there was no liability on the part of defendant for his injury, and that there could be no recovery. The judgment will therefore be reversed.

FINDING OF FACTS.

We find that the defendant was not guilty of any or either of the acts of negligence alleged against it in the several counts of plaintiff's declaration; that the plaintiff was not in the exercise of ordinary care for his own safety at the time of his injury, and that said injury was caused by his own negligence and the negligence of another person not a servant of defendant.

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Edward Coleman v. Willis E. Wiley.

1. APPELLATE COURT PRACTICE—*Abstract, Motion for a Continuance.*—Where error is assigned upon the overruling of a motion for a continuance by the court below, and the affidavit upon which the motion was based, does not appear in the abstract, the court will not consider it.

2. CONSTABLES—*Levying upon Property Exempt, etc.*—Under section 5 of the act to exempt personal property from attachment and sale on execution, an officer is liable to the party injured for levying upon property exempt, for double the value of such property.

Memorandum.—Trespass. In the Circuit Court of La Salle County, on appeal from a justice of the peace; the Hon. CHARLES BLANCHARD, Judge, presiding. Trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 13, 1894.

C. P. GARDNER and MAYO & WIDMER, attorneys for appellant.

E. S. BROWNE and BROWNE & AYERS, attorneys for appellee.

MR. JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.
This is a suit by appellee against appellant, a constable,

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for levying an execution upon exempt property and subsequently selling it.

The suit was commenced before a justice of the peace, and there judgment was recovered by appellee for \$200. Appellant prosecuted an appeal to the Circuit Court, where a trial was had, resulting in a like judgment.

In the Circuit Court appellant moved for a continuance, but the motion was overruled. He now urges that the overruling of the motion was error, because his motion was supported by an affidavit showing good grounds for a continuance. The affidavit does not appear in the abstract, and for that reason the point will not be considered.

The only contention made upon the merits of the case, is that the property taken was the partnership property of appellee and a Mr. Richards, and being partnership property, was not exempt. It is true that appellee and Richards had started a saloon, and were to be partners in the business if Richards should obtain money he was expecting, to put into it. Richards failed to obtain the money, and some ten or fifteen days before the levy of the execution, Wiley told him he must get out, which he did, voluntarily leaving the entire business and property to Wiley and claiming no interest in it. The firm was thereby dissolved by mutual consent, and the property levied upon was not partnership property.

We see no substantial error in the instructions. Judgment affirmed.

John Cornshock v. People of State of Illinois.

1. WIFE ABANDONMENT—*May be Prosecuted by Information.*—The offense of wife abandonment created by the act of June 17, 1893, is a misdemeanor and as such may be prosecuted by information in the County Court.

2. INFORMATION—*Criminal Offenses in the County Court.*—Under Section 117 of Chapter 87, R. S., entitled "Courts" (Furd's Statutes, 1893, p. 451), all offenses cognizable in County Courts are to be prosecuted by information.

3. CONSTRUCTION OF STATUTES—*Section 2 of the Act to Prevent and Punish Abandonment of Wife or Children.*—The language of that clause of section 2 of the act to prevent and punish abandonment of wife or children (Laws 1893, 1), providing that every husband, who, without good cause, abandons his wife or children, shall be indicted and tried, etc., must be construed to mean that persons guilty of this offense shall be subject to indictment and trial, and not as excluding the procedure by information provided by general law for all misdemeanors.

4. JUDICIAL NOTICE—*Political Subdivisions of a County.*—In the trial of a misdemeanor, the County Court will take judicial notice that a township (of the county) is in the county without proof, for the purpose of proving the venue as laid in an information.

5. INSTRUCTION—*On the Reasonable Doubt.*—An instruction that a reasonable doubt requires no more than a mere possibility of the defendant's innocence, is too favorable to the defendant in requiring no more than a mere possibility of his innocence to create a reasonable doubt.

Memorandum.—Information. In the County Court of Livingston County; the Hon. R. R. MILLER, Judge, presiding. Trial by jury and conviction; appeal by defendant. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 13, 1894.

APPELLANT'S BRIEF, B. F. JONES, ATTORNEY.

The information filed in this case charges that the crime was committed in Livingston county, State of Illinois, but there is no evidence that it was committed in the county and State as alleged. *Jackson v. People*, 40 Ill. 405; *Rice v. People*, 38 Ill. 435; *Sattler v. People*, 59 Ill. 68.

It is not enough to prove street and locality. *Dougherty v. People*, 118 Ill. 163.

A penal law shall not be extended so that things which do not come within the meaning of the words, shall be brought within it by construction. If these rules are violated the fate of the accused person is decided by arbitrary discretion of judges and not by express authority of statute laws. *Potter's Dwarrior on Statutes*, 247.

Formerly, in Massachusetts, it was held that all misdemeanors could be prosecuted by information unless restricted by statute to indictment. Now they have a statute which commands all crimes to be by indictment, unless restricted by statute to information, thus showing conclusively that if the statute restricts to a particular mode of procedure, that

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procedure must be followed. Wharton's Crim. Ev., 8th Ed., p. 65, Sec. 88.

Words must be given their true meaning, and only when they are ambiguous, are they to be expanded. *Ottawa Coke & Gas Co. v. Downey*, 127 Ill. 204; *Misch v. Russell*, 136 Ill. 25; *Brockway et al. v. Highway Com.*, 130 Ill. 490; *Orear v. Krum*, 135 Ill. 299; *Brockway et al. v. Virginia et al.*, 76 Ill. 34; *Hill v. City of Chicago*, 60 Ill. 86; *Chicago, Mil. & St. Paul R. R. v. Drunsdy*, 109 Ill. 402; *Stuart v. Hamilton*, 66 Ill. 253.

APPELLEES' BRIEF, EDGAR P. HOLLY, STATE'S ATTORNEY.

The constitution expressly says that County Courts shall have jurisdiction of such other matters, not enumerated by the constitution, "as may be provided for by general law." The general law has given them jurisdiction of all misdemeanors. A special law can not take away a jurisdiction given by the general law, given under the positive direction of the constitution. *Farwell v. Cohen*, 138 Ill. 257.

When there are two constructions, either of which can be given a statute, the one in harmony with the general law and with the constitution should always be given. *Bish. St. Crimes*, Sec. 90; *Buncomb v. People*, 12 Iowa 1; *People v. Peacock*, 98 Ill. 172; *Burns v. Henderson*, 20 Ill. 264; *Fornell v. Cohen*, 138 Ill. 257.

The word "shall" is very frequently construed so that it is used in the same sense as "may." *Burn v. Henderson*, 20 Ill. 264; *Swensen v. McLaren*, 21 S. W. Rep. 300; *Adam v. Sleeper*, 64 Vt. 344.

The venue may be proven directly or by indirect evidence. *Harlen v. Stoll*, 33 N. E. Rep. 1102; *Stoll v. Farley*, 53 N. W. Rep. 1089; *Sullivan v. People*, 114 Ill. 24.

Or it may be proven by circumstantial evidence from which the venue may be inferred. *Abbego v. State* (Tex.), 15 S. W. Rep. 408; *Stoll v. Sneider*, 44 Mo. App. 429; *Stoll v. Sanders*, 17 S. W. Rep. 223; *People v. McGreggrego* (Cal.), 26 Pac. Rep. 97; *Hayse v. Commonwealth* (Ky.), 14 S. W.

Rep. 833; *State v. Cantieny*, 34 Minn. 1; *State v. Guar*, 29 Minn. 221.

Where the evidence does not expressly locate the crime as having been committed in the county, but there are in the evidence references to the various places, localities and landmarks, known by or familiar to the jury, and from which they may reasonably conclude that the offense was committed in the county, it is sufficient. *Duncan v. State* (Fla.), 10 So. Rep. 815; *Weinsche v. State* (Neb.), 51 N. W. Rep. 307.

Nor is it necessary to prove the venue beyond a reasonable doubt; if there is evidence from which it may be inferred, it is sufficient. *Cox v. State* (Tex.), 12 S. W. Rep. 493; *Worrace v. State* (Fla.), 8 So. Rep. 748.

Though all these States hold that where the evidence wholly fails to show the venue, the verdict must be set aside. *Shillian v. State* (Tex.), 11 S. W. Rep. 2157; *State v. Young* (Mo.), 12 S. W. Rep. 642; *Calkins v. State* (Fla.), 9 So. Rep. 652.

MR. JUSTICE CARTWRIGHT DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was prosecuted by information filed in the County Court of Livingston County, charging him with willfully and without good cause abandoning his wife, Mary M. Cornshock, and neglecting and refusing to maintain and provide for her. He was found guilty by a jury and was sentenced to confinement in the county jail for two months and to pay a fine of one hundred dollars and costs.

A motion was made to quash the information on the ground that defendant could only be prosecuted by indictment for the offense, but the motion was overruled.

Section 7 of the subdivision of chapter 37, Revised Statutes, relating to County Courts, provides that said courts shall have concurrent jurisdiction with Circuit Courts in all criminal offenses and misdemeanors where the punishment is not imprisonment in the penitentiary or death, and section 117 of said subdivision provides that all offenses cognizable

in County Courts shall be prosecuted by information. The offense with which the defendant in this case was charged was created by statute in force July 1, 1893, and it was defined to be a misdemeanor punishable by fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail, house of correction or work house, not less than one month nor more than twelve months, or by both such fine and imprisonment. It therefore belonged to the class of offenses which by general law were declared cognizable in County Courts and were to be prosecuted by information. The claim that such proceeding could not be had is based upon the provision in section 2 of the act of 1893, that every husband who shall be guilty of all or any one of the misdemeanors specified in the act, shall be indicted and tried. There is nothing in the nature of the offense which leads us to suppose that the legislature which fixed its grade intended to impose any restriction on its prosecution in like manner with other offenses of the same grade, or to confer an exemption from the terms of the general law upon that class of offenders. That such was the intention, we think, should be made clear to justify us in so holding. To say that the words of section 2 were used in a restrictive sense and for a restrictive purpose to exclude prosecution under the general law, would render it imperative that every guilty husband should not only be indicted but also tried, even though he might desire to plead guilty. The word shall, applies to the trial equally with the indictment, and such a conclusion would be absurd. We take the language used to mean that persons guilty of this offense shall be subject to indictment and trial, and not as excluding the procedure by information provided by general law for all misdemeanors.

It is insisted that the venue was not proven. The evidence was that the defendant and his wife were married in the city in which this case was tried, across the street from the court house, which was in Livingston county; that they went to the home of her brother in Union township; that the abandonment took place at once; that she afterward lived in Union township about four weeks at another time, and that

she lived in Odell the remainder of the time up to the trial. The defendant never maintained or provided for her, and never gave her a cent. The proof was ample to show the commission of the offense in Union township, a political subdivision created for governmental purposes in the county of Livingston, in this State, of which the court will take notice. 1 Greenleaf on Evidence, Sec. 6; Sullivan v. People, 114 Ill. 24; Sullivan v. People, 122 Ill. 385. The venue was therefore sufficiently proven.

Complaint is made of an instruction given at the instance of the people, wherein the jury was told "that a reasonable doubt requires no more than a mere possibility of the defendant's innocence." The instruction was too favorable to defendant in requiring no more than a mere possibility of his innocence to create a reasonable doubt, but he can not complain of the error in his favor. His guilt was clearly proven, and the judgment will be affirmed.

**William Mischke v. The Chicago, Burlington and
Quincy R. R. Co.**

1. MASTER AND SERVANT—*No Recovery for Injuries Occasioned While Violating the Rules of the Master.*—A section boss in the employ of a railroad company, and in charge of a hand car, contrary to the rules of the company, took his wife upon it, as a passenger, over the track, to church on a Sunday. They were run into by an engine, and in endeavoring to save his wife, the section boss had four of his toes cut off. *It was held* that the injury sustained by him was due to the wrongful presence of his wife upon the hand car as a passenger by his procurement, and his right of recovery was denied.

Memorandum.—Action for personal injuries. In the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding. Declaration in case; plea, not guilty; trial by jury; verdict for defendants by instruction of the court and judgment; appeal by plaintiff. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 13, 1894.

BREWER & STRAWN, attorneys for appellant; O'CONOR,
DUNCAN & HASKINS, of counsel.

Mischke v. C., B. & Q. R. R. Co.

SAMUEL RICHOLSON, attorney for appellee; O. F. PRICE, of counsel.

MR. JUSTICE CARTWRIGHT DELIVERED THE OPINION OF THE COURT.

Appellant was plaintiff in this suit in the Circuit Court, and in his declaration, which contained three counts, he alleged that he was a section boss of appellee, defendant in the suit, and that while he was rightfully riding upon and driving a hand car on defendant's railroad, other servants of defendant in charge of an engine so negligently, wantonly and maliciously managed and drove the same that it struck and injured him. The defendant pleaded the general issue and the parties went to trial. Plaintiff then proved that he was a section foreman on the I. V. & N. branch of defendant's road running from La Salle to Streator and lived at Ticona; that his section extended two miles northwest and three miles southeast from Ticona; that on Sunday, April 13, 1890, he took defendant's hand car, of which he had charge, for the purpose of going to church; that he took off some tools and left some on, and if he had seen anything wrong on his way to church he would have fixed it; that he took his wife and a section hand and started with the hand car for the church four miles away, which they would reach by going three miles on the hand car and walking a mile across the country; that while they were all working the hand car going up grade and all facing southeast and giving no attention to anything behind them, an engine following them and running rapidly, backing up, approached and whistled when about ten rods from them, that plaintiff and the section hand got off from the hand car at the sides of the track in safety, but plaintiff's wife jumped off backward in the middle of the track in front of the approaching engine and fell down, and that plaintiff seeing his wife's danger jumped to the track, and with his right foot against the rail, took her by the hand to pull her off, but before he succeeded she was run over and killed and four of his toes were cut off. Plaintiff having intro-

duced all his evidence, the court directed a verdict for defendant which was returned and judgment was entered accordingly.

Disregarding all other questions affecting the right of plaintiff to recover, the fact that the loss of his toes for which he sued was wholly due to the wrongful presence upon the hand car of his wife as a passenger by his procurement and authority, was a bar to recovery. There was and could be no pretense that his act in taking his wife as a passenger to church with defendant's car and upon its road was the exercise of any right or the performance of any duty to defendant. Plaintiff got off in safety, and his injury was caused by his going into danger to rescue his wife from her perilous position. The proofs did not tend to sustain the charge made in the declaration, nor did they tend to show that the injury was in any respect wanton or willful. Under such proof there could be no recovery by plaintiff and a verdict for defendant was properly directed.

It is complained that the court refused to admit evidence that plaintiff had been over his section before that on Sunday, and that it was his duty to look after the track, and to let him prove what purpose he had in taking the tools on the hand car. There was no question but that the purpose of the trip was going to church, and that it would not have been undertaken if that object had not been in view, and the only effect claimed for the evidence is that it would have a bearing on the question whether he was a trespasser in taking the hand car and tools and going over the road, but it could have no influence upon the fact of his taking his wife as a passenger. She had no object except to go to church, and it is not claimed that her presence on the car was due to any duty of repair or inspection or any intention to perform any such duty. But for her presence the injury would not have occurred, and if everything which it was proposed to put in evidence had been admitted there would still have been no right of recovery. Being of the opinion that the direction given was proper and the verdict right, the judgment will be affirmed.

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Illinois Central Railroad Co. v. Artemise S. Ashline, Administratrix of Laurence Ashline.

1. **DAMAGES—Measure of—Death from Negligence.**—On the trial of an action by a widow for damages sustained by reason of the death of her husband, alleged to have been caused by the negligence of the defendant, it is error to instruct the jury that they have a right to take into consideration the number of her family in estimating damages. Damages can only be estimated on the basis of the pecuniary loss sustained.

2. **INSTRUCTIONS—Limit of Damages—Death from Negligence.**—It is error to instruct the jury in an action for damages sustained by reason of death from negligent acts that the statute limits the recovery to \$5,000, and that in case they find for the plaintiff, the amount of their verdict can not exceed that sum.

3. **ORDINARY CARE—Slight Negligence.**—A person may exercise ordinary care and yet be guilty of slight negligence, which will not prevent a recovery; but the absence of ordinary care will defeat it.

4. **COMPARATIVE NEGLIGENCE—Abolished.**—Comparative negligence as a legal doctrine no longer exists in this State.

Memorandum.—Action for damages. Death from negligence. In the Circuit Court of Kankakee County; the Hon. CHARLES R. STAER, Judge, presiding. Declaration in case; plea, not guilty; trial by jury. verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1894. Reversed and remanded. Opinion filed December 18, 1894.

WHEELER & HUNTER, attorneys for appellant.

EDWARD E. DAY and D. H. PADDOCK, attorneys for appellee.

MR. JUSTICE CARTWRIGHT DELIVERED THE OPINION OF THE COURT.

This is a suit by appellee as administratrix of the estate of her deceased husband, Laurence Ashline, to recover damages for his death caused by an excursion train of appellant on Sunday evening, September 4, 1892, in the city of Kankakee. There was a trial and recovery by appellee.

The train consisted of an engine and tender with eight

passenger coaches and a baggage car. It ran from Chicago to Gougar's Grove and returned to Chicago in the evening. From Kankakee to Gougar's Grove and return it used the tracks of the Cleveland, Cincinnati, Chicago & St. Louis Railroad, known as the "Big Four," which were connected by a "Y" in the city of Kankakee with defendant's road. On the return trip the train was stopped at the depot of the Big Four to get orders. It was in the dusk of evening and rain was falling. After getting orders the train was started toward the "Y" connection where it would reach defendant's road, and crossed Schuyler avenue, a street of the city of Kankakee. The deceased was struck by the train either on that avenue or west of it, on the right of way of the Big Four, and was injured so badly that he soon after died. The material questions of fact in dispute before the jury were, whether the deceased was struck by the train on the public crossing at the avenue or on the right of way west of it; whether the bell was rung as required by statute, and whether the speed of the train exceeded ten miles an hour, the rate fixed as the limit by an ordinance of the city of Kankakee. We shall not discuss the evidence upon these questions as they will be submitted to another jury, but a reading of the record indicates a preponderance of the evidence in favor of defendant's claim as to each of them.

It was proved that deceased was a baker, working for some other person in a bakery, and that he left a widow and seven children, six of whom were still living, who depended on him for support in his lifetime; but there was no evidence as to the amount of his usual earnings, or his ability to earn money for their support. The first instruction given at the request of plaintiff, was as follows:

For the plaintiff the court instructs the jury that while you are not to give a verdict on the ground of sympathy, yet, if you believe from the evidence the plaintiff is entitled to recover, you have a right to take into consideration the number of her family and their ages, in estimating the damages.

Damages could only be estimated on the basis of the pe-

I. C. R. R. Co. v. Ashline.

cuniary loss sustained. The next of kin were those whom the deceased was bound by law to support, but their loss was not to be measured merely by their necessities. The income in which they were entitled to share might be very small, although the family might be very large. There being no proof of the income or earning capacity of deceased, the jury might understand that the damages could be assessed on the basis merely of what it would require to support a given number of persons, although such damages could not rest on pure sympathy. We think the instruction of a misleading character.

The second instruction given for plaintiff was as follows:

The court instructs the jury for the plaintiff, that the law of Illinois limits the amount that can be recovered, where one is killed, to the sum of five thousand dollars, and if the jury find for the plaintiff in this case, under the law and the evidence, the damages can not exceed five thousand dollars.

This instruction was of the same purport as the one condemned in *C., R. I. & P. R. R. Co. v. Austin*, Adm'x, 69 Ill. 426, and was equally objectionable. The court also gave the thirteenth instruction asked by plaintiff, as follows:

The court further instructs the jury that slight negligence means the absence of that degree of care and vigilance which persons of ordinary prudence and foresight are accustomed to use under similar circumstances.

The deceased might have exercised ordinary care, and yet have been guilty of slight negligence, which would not prevent a recovery, but the absence of ordinary care on his part would defeat a recovery. Ordinary care and slight negligence may both be present. The definition was wrong, and it was important that it should be correct when taken in connection with others allowing a recovery, although the deceased was guilty of slight negligence. Among the instructions was the fifteenth, given as follows:

If the jury believe from the evidence in this case that the defendant, or its servants operating the train in question in this case, failed to ring the bell or blow the whistle from the time they left the depot until they struck Laurence Ashline,

and that by reason of said failure the said Ashline was struck by said train on a public crossing and received injuries from which he died, that they should find for the plaintiff, unless they should further believe from the evidence that said Ashline, while crossing the tracks of the defendant, was negligent, and that his negligence was not slight when compared with that of defendant.

This was an attempt to apply the doctrine of comparative negligence, which is no longer the law of this State. *L. S. & M. S. Ry. Co. v. Hessions*, 150 Ill. 546. It omitted the requirement that the deceased exercised ordinary care, and this was necessary to a recovery. *C., B. & Q. R. R. Co. v. Johnson*, 103 Ill. 358, 522; *Calumet Iron and Steel Co. v. Martin*, 115 Ill.; *L. S. & M. S. Ry. Co. v. Hessions*, *supra*. Under the rule attempted to be applied, the negligence of defendant must have been gross, and the instruction amounted to a statement that a failure to ring the bell or blow the whistle was gross negligence of itself. There is no rule of law of that kind. The instruction changed the burden of proof, which was on plaintiff, to show that the deceased exercised ordinary care, and directed a recovery unless he was proved negligent, and that his negligence was of a higher degree than that which was defined in the thirteenth instruction as an absence of ordinary care. The instruction was erroneous.

The judgment will be reversed and the cause remanded.

**Illinois Central Railroad Company v. Olive S. Case,
Administratrix of Lucius M. Case.**

1. **NEGLIGENCE—Burden of Proof.**—It is incumbent upon an administratrix, suing for damages sustained by reason of the death of her husband, alleged to have been caused by the negligence of a railroad company, to prove such negligence by a preponderance of the evidence.

Memorandum.—Action for damages. Death from negligent act. In the Circuit Court of Kankakee County; the Hon. CHARLES R. STARR,

I. C. R. R. Co. v. Case.

Judge, presiding. Declaration in case; plea, not guilty; trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1894, and reversed with a finding of facts. Opinion filed December 13, 1894.

WHEELER & HUNTER, attorneys for appellant.

C. A. LAKE, attorney for appellee.

MR. JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This suit was commenced by appellee to recover damages for the killing of her husband, at a crossing of appellant's railroad in the city of Kankakee.

The declaration contains two counts. The first charges that while the deceased was driving with a horse and wagon upon a highway crossing over appellant's railroad, the servants of appellant in charge of one of its locomotive engines and train of cars negligently ran upon the horse and overturned the wagon, whereby the deceased was thrown from the wagon and killed. The second count charges negligence in failing to perform the statutory duty of ringing a bell or sounding a whistle, continuously, for eighty rods before reaching the crossing, whereby the cars came upon the horse without warning and frightened him, and the horse, to avoid destruction, wheeled suddenly around and overturned the wagon, thereby throwing deceased upon the ground with such violence as to kill him. There was a recovery for \$3,500.

The evidence shows that the deceased, in company with his daughter, was driving one horse attached to a light wagon and approached the crossing just after a train going south had passed. A switch engine was at the time engaged in picking up some passenger cars. It had just coupled onto two cars and was backing north toward the crossing as the deceased was in the act of driving upon it. It was dark and on the end of the coach nearest the crossing stood a brakeman with a light in his hand. The train was not moving faster than two miles per hour. As soon as the brakeman saw the deceased he called upon him to stop and signaled the engineer to stop. The engineer applied the air

brakes and the cars stopped almost immediately. The horse, being a young one, became frightened, wheeled around and threw the deceased out with such violence that injuries were sustained which resulted in his death that night. There was no evidence whatever that the horse was struck by the car. He was several feet away from it when he turned. The proof is overwhelming that the bell was rung continuously from the time the engine started until it stopped.

The record is barren of any proof in support of the first count of the declaration, and the meager proof upon the point of appellee in support of the second is so completely overcome by the testimony offered in behalf of appellant that we can not allow the judgment to stand.

Two of appellee's instructions are erroneous, because not applicable to the pleadings, but we prefer to reverse the judgment upon the ground that no negligence of appellant was shown. The case will not be remanded. Judgment reversed.

FINDING OF FACTS TO BE INCORPORATED IN THE JUDGMENT OF
THIS COURT.

The court finds that the defendant in the court below was guilty of no negligence which contributed to the death of Lucius M. Case, Jr., plaintiff's intestate, and that the plaintiff has no cause of action against the defendant.

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**Christian Hemm, Barbara M. Hemm, Daniel Hemm,
Solomon Hemm, Maggie O. Oehler, and Daniel
Hemm, as the Administrator of the Estate
of Martin Hemm, v. Alexander Small,
Thomas Small and Henry
M. Hopkins.**

1. *MORTGAGEE—A Purchaser at His Own Sale.*—Where a complainant, in a proceeding to foreclose a mortgage, buys in the premises at a master's sale, he is to be treated the same as any other purchaser, and is liable to account for all he realizes out of the foreclosure over and above the indebtedness due him.

Hemm v. Small.

Memorandum.—In equity. Appeal from the Circuit Court of Kendall County; the Hon. CLARK W. UPTON, Judge, presiding. Hearing upon a creditor's bill and decree for defendant. Heard in this court at the May term, 1894. Reversed with direction. Opinion filed December 13, 1894.

J. M. RAYMOND and ALSCHULER & MURPHY, solicitors for appellants.

M. O. SOUTHWORTH, solicitor for appellees.

MR. JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This is a creditor's bill filed by appellees, who recovered judgment against Alexander Small in 1890, aggregating about \$3,000, and have been unable by the usual process of execution to obtain satisfaction.

The bill charges that Alexander Small, at one time the owner of and in possession of a valuable tract of land and a large amount of personal property, has fraudulently disposed of the same, so as to defeat complainant in the collection of their debts, and more particularly that he, without consideration, disposed of a certain real estate mortgage for the sum of \$4,000 to his son-in-law, Henry M. Hopkins, who foreclosed the same and realized on a sale by the master in chancery of the premises, \$4,325.11.

Small and Hopkins filed answers denying fraudulent transfer of property, etc., and over that the mortgage above mentioned was assigned for full consideration.

Upon a hearing the court found for the defendant and dismissed the bill.

There is no mooted question of law involved. The evidence covers a large range. We do not care to consider in this opinion other of it than that which related to the \$4,000 mortgage.

It appears that the mortgage was a second mortgage given by James W. Small to Alexander Small to secure \$4,000, borrowed money. Alexander, having occasion to borrow money in bank at Aurora, deposited this mortgage as collateral security. It stood as collateral for several

years, until June, 1888, when the bank, to which he owed \$3,000, demanded additional security. Whereupon he procured Hopkins to become his security for the \$3,000 by signing a note with him, and to make Hopkins safe, assigned the James Small note and mortgage for \$4,000 to Hopkins. Small kept the interest on the \$3,000 note paid, but Hopkins eventually paid the principal and filed his bill to foreclose the mortgage, and the mortgaged premises were sold by the master in chancery (subject to a first mortgage) for \$4,325.11, net. Hopkins was the purchaser.

There were other transactions between the parties, but they seem to have little connection with this one. At all events, Hopkins was liable to respond to all he realized out of the foreclosure proceeding over and above the \$3,000 paid by him to the bank.

But it is insisted that as this mortgage was a second one, and Hopkins was compelled to pay large sums as interest on the first mortgage (over \$1,000), that should be added to the \$3,000 paid as a set-off against the \$4,325.11.

We do not think so. Hopkins must be regarded as any other purchaser. The amount bid by him at the master's sale must be regarded as that much cash received by him. He must be regarded as bidding with the first mortgage in view, and to have regulated his bid accordingly. When he paid interest on and bought in the first mortgage, he was simply removing a prior incumbrance for the benefit of his own prospective title. The first mortgage was given to secure the debt of James Small—not Alexander Small.

The court should have found for appellants and rendered a money decree against Hopkins for the difference between the amount paid by him on the \$3,000 note and the net proceeds of the master's sale of the mortgaged premises. The decree will be reversed, with directions to the Circuit Court to render a decree as indicated.

Miller v. Crouse.

Marcus J. Miller v. Jacob H. Crouse.

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1. **TRIALS—Conduct of the Judge.**—A remark of the trial judge as to what the evidence shows, where there is no evidence tending to prove differently and the question is not a controverted one, is not error.

2. **CONVEYANCES—Grantee's Name in Blank.**—A deed of land in which there is no grantee named, is a nullity.

3. **ESTOPPEL—Acceptance of Goods Without Complaint.**—Where a person received a stock of goods at an invoiced price according to the terms of an agreement and without objection, he will be estopped from afterward questioning the amount of the goods or the price at which they were invoiced.

4. **INSTRUCTIONS—When Superfluous.**—The court instructed the jury that certain matters, if proved, would not constitute a defense to the action. No defense of that kind was made. It was held not to be reversible error.

Memorandum.—Assumpsit. In the Circuit Court of Carroll County; the Hon. JOHN D. CHABTREE, Judge, presiding. Declaration on contract and common counts; plea of general issue; trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 18, 1894.

O. F. WOODRUFF, W. H. A. RENNER and C. C. DUFFY,
attorneys for appellant.

JAMES M. HUNTER, attorney for appellee.

MR. JUSTICE CARTWRIGHT DELIVERED THE OPINION OF THE COURT.

Appellee brought this suit against appellant to recover damages resulting from a failure of title as to five acres of a tract of land conveyed by appellant by warranty deed to appellee as part of a consideration for a stock of goods, and also from a failure of appellant to convey to appellee another tract of one hundred and sixty acres agreed to be conveyed as a further portion of the consideration for said stock of goods. There was a trial and a recovery of \$2,156.17.

The declaration alleged the making of a contract between the plaintiff and defendant, under which the defendant made

the warranty deed and by which he became bound to convey the tract of one hundred and sixty acres, and the main contention on this appeal is that the contract as appearing in the evidence varied materially from that so stated in the declaration. The supposed variance arises out of a claim of defendant that he made the contract with one Harry Horning and not with the plaintiff, but the evidence affords no support to the claim. Plaintiff was the owner of a stock of goods in Mt. Carroll, Illinois, of which Horning was in charge as his agent. On June 16, 1891, defendant made a contract with Horning by which he agreed to convey to Horning one hundred acres of land in Carroll county, Illinois, and one hundred and sixty acres in Kimball county, Nebraska, and to pay eleven hundred dollars in cash, and Horning agreed to deliver to defendant the stock of goods which was to amount in value to eleven thousand dollars at net cost. In this contract Horning did not disclose his agency, but it was made known to defendant, and the plaintiff's relation to the transaction was fully understood before any payment was made or any land conveyed.* Defendant was moving the goods to the railroad station and shipping them away when Horning went to his principal, the plaintiff, and brought him from his residence in the country to Mt. Carroll. Plaintiff and defendant then met in an abstract office and from that time Horning was never recognized as having any interest in the transaction and he never had any connection with it. Plaintiff expressed dissatisfaction with the arrangement. An examination showed that defendant did not own one hundred acres in Carroll county. A deficiency of five acres then appeared, and in lieu of said five acres defendant agreed to convey one hundred and sixty acres in Box Butte county, Nebraska. This agreement was in writing dated June 20, 1891, and provided for a conveyance to plaintiff on or before July 1, 1891, of said tract by good and sufficient warranty deed, clear of all incumbrances, at a value of sixteen hundred dollars, and this agreement recited that said land was part consideration for the dry goods stock owned by plaintiff and given in exchange

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to defendant. Long after that defendant wrote to plaintiff's attorney that he would fix the matter satisfactory to the plaintiff and his attorney.

Defendant paid the cash payment of \$1,100 to the plaintiff or to his attorney for him and made the warranty deed to the plaintiff, of land in Carroll county. There is no evidence tending to prove that defendant thought or suspected that he had any engagement with Horning, or that such was the fact. There was no variance.

The court sustained an objection to a question of defendant's counsel as to what Horning said about the ownership of the goods and remarked, "I think the evidence all shows that the deal was made between Crouse and Miller as to the conveyance of the land." It is argued that this was an exceedingly grave error by which the court invaded the peculiar province of the jury, took the question from them and decided it himself. As there was no evidence tending to prove differently from the statement made; the question could not be regarded as a controverted one before the jury. No juryman could have found otherwise and no possible harm could have come to the defendant from the statement.

It turned out that defendant had no title to five acres of the tract of land in Carroll county, for which he finally made the warranty deed to plaintiff, and the plaintiff showed a right to recover the resulting damages. Defendant also failed to convey to plaintiff one hundred and sixty acres of land in Box Butte county, Nebraska, according to his agreement. He gave to the plaintiff's attorney a blank form of deed partly filled up, in which Gerhard Eykamp and wife appeared as grantors, and which described a quarter section in Box Butte county, Nebraska, but it did not contain the name of any grantee. It was therefore a nullity. *Chase v. Palmer*, 29 Ill. 306; *Whitaker v. Miller*, 83 Ill. 381.

The attorney inserted plaintiff's name as grantee, but no authority from the grantors for the act was shown. It is insisted that by the insertion of the name some right of the defendant was destroyed, that his deed was gone, and he

was left without redress, and that plaintiff should be estopped from questioning the validity of the deed. No right of defendant in the land was destroyed or affected, for the deed conferred none upon him or any other person, and as no right could be obtained or preserved by means of it there was no necessity of surrendering it.

Defendant sought to prove by a banker and a lawyer who had noticed the stock in a general way, what their opinion was as to its value, but neither of them showed any ability to give an opinion which would aid in determining whether or not the goods were invoiced at net cost according to the agreement. There was clearly no merit in any claim on that ground. The defendant received the goods in June, 1891, and in his letters written in February and March, 1892, wherein he promised performance on his part, he made no complaint as to the amount of the goods or the prices at which they were invoiced.

Complaint is made of the giving of the eighth instruction for plaintiff concerning inadequacy of consideration for an agreement, and the objection made to it is that no defense was made on that ground and no question was attempted to be raised as to inadequacy of consideration. As no defense of that kind was made, the instruction that such a defense would not defeat the agreement did no harm, and the objection that it was superfluous would not justify a reversal. The judgment seems to be right and it will be affirmed.

M. L. Overstreet and J. L. Overstreet v. Ed. P. Dunlap.

1. **VERDICT—When Conclusive.**—The question as to whether the maker of a note signed it under duress, is one of fact for the determination of a jury, and where the evidence is conflicting, their verdict will ordinarily settle the matter.

2. **EVIDENCE—Want of Consideration.**—Where a person charged another with stealing his hogs, and compelled him to sign a promissory note under fear of imprisonment, in an action upon the note by such person, it is proper for the defense to introduce any evidence tending to

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show the falsity of the charge, as bearing on the question of whether the payee had a claim adequate to support a compromise therefor, on the issue of a want of consideration of the note.

3. *WITNESSES—Impeachment of—Limit of the Examination.*—If a witness, sworn for the purpose of impeachment, testifies that he is not acquainted with the general reputation of the person sought to be impeached, for truth among his neighbors, he should not be allowed to testify further on the subject.

4. *IMPEACHMENT—What Constitutes a Good Reputation.*—A good reputation may be known without its being generally discussed among the neighbors; it excites no general discussion.

5. *TRIAL—Limiting Impeaching Witnesses.*—The action of a judge in attempting to limit the number of impeaching witnesses by saying to the attorney of the party calling them, that if he called any more, it would be at his expense, is not erroneous, as an intimation by the court that the character of the person attacked had been sustained.

6. *DURESS—Person Pleading Must Have Acted as a Reasonable Man.*—The fact that a person pleading duress as a defense to a promissory note, did not act as a reasonable man would have done under the circumstances, has no application where the note is still in the hands of the person charged with the duress and the action is brought by him.

Memorandum.—*Assumpsit.* In the Circuit Court of Knox County; the Hon. ARTHUR A. SMITH, Judge, presiding. Declaration on a promissory note; the pleas are stated in the opinion of the court; trial by jury; verdict and judgment for defendant; appeal by plaintiff. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 13, 1894.

J. A. McKENZIE and A. M. BROWN, attorneys for appellants.

APPELLEE'S BRIEF, THOMPSON & SHUMWAY AND F. F. COOKE,
ATTORNEYS.

Appellee contended that where there is no moral or legal obligation to make good another's loss, there is no consideration for a settlement. There must be a claim sustainable in law or equity to sustain a settlement. If it was utterly without foundation, the consideration fails. *Knotts v. Preble*, 50 Ill. 226; *Mulholland v. Bartlett*, 74 Ill. 58; *Chitty on Contracts*, p. 35; 1 *Parsons on Contracts*, p. 437.

When a contract is procured to be executed under a threat of arrest under a warrant, it is void not only because

of duress but because it is against public policy to permit abuse of process. *Bane v. Dieterich*, 52 Ill. 20; *Spaids v. Barrett*, 57 Ill. 292; *Henderson v. Palmer*, 71 Ill. 579; *Shank v. Phelps*, 6 Brad. 613; *Schommer v. Farwell*, 56 Ill. 543.

MR. PRESIDING JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This was a suit commenced by confessing judgment by virtue of a power of attorney annexed to a promissory note given by appellee to appellants, dated July 18, 1893, for \$420, due one day after date, with seven per cent interest after July 4, 1893, until paid, with \$25 as attorney fees, and a credit on the back of the note of \$20, of the same date of the note. The judgment was opened up at the next October term of the Circuit Court, 1893, at the instance of appellee, and he was given liberty to plead to the merits, which he did in two pleas: first, want of consideration; second, duress, in that appellants falsely accused appellee of stealing their hogs, and with one I. N. Coakley, marshal of the city of Galesburg, Ill., threatened to arrest appellee and put him in jail unless he would sign the said note; denied the stealing of the hogs and the charge was wholly false; and that by reason of such threats and in fear thereof the appellee made and executed the note in question, etc.

The appellants filed replication to the first plea, averring the note was given on a settlement of a claim for hogs which appellants had lost to the value of \$600, and which he accused appellee of having taken, and appellee admitting having taken some of appellant's hogs but not so many as claimed, gave the note in question in settlement of such dispute, etc.

Second replication to first plea, in substance the same, and avers appellants had been induced by the settlement to make no further search for the hogs they claimed to have lost.

Replication to the second plea takes issue on the allegation of duress by the threats mentioned in the plea. Ap-

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appellee filed two special rejoinders to the first and second replications which were demurred to and demurrer sustained, and appellee assigns cross-error as to the action of the court. These rejoinders were a departure from the matter set up in the replications and conclude with a verification, whereas appellee should have simply taken issue to all material parts of the replications and concluded to the country.

It will not be necessary for us to consider the question further in the view we take of the case. Besides these rejoinders, issue in proper form was taken on the replications. The case was tried by a jury resulting in a verdict for defendant. Motion by appellants for new trial was overruled by the court and judgment rendered against them for costs. From this judgment this appeal is taken. The circumstances of giving the note in suit are about as follows: The appellant M. L. Overstreet, is the father of J. L. Overstreet; the former lived in Galesburg and owns a farm some two miles and a half from it, of which his son J. L. had charge in the summer and fall of 1892; they owned in partnership 115 head of hogs and shoats, which were kept on the farm and in charge of the son. The latter made a visit to Florida about November 10, 1892, and returned about the 1st March, 1893; while he was absent he left them in charge of George Overstreet, grandson of M. L. and nephew of J. L. Overstreet. Dunlap, appellee, lived about one half mile from Overstreet's farm, and George Overstreet boarded with him a part of the time while his uncle was gone to Florida; then one Bengston moved in, November 13, 1892. George Overstreet boarded at Dunlap's about two weeks, and then on the farm. He did not understand that any of the hogs were gone until his uncle returned from Florida. Soon after John's return he and his father discovered, or thought they did, that about thirty of their hogs had disappeared. They then consulted I. N. Coakley, the city marshal of Galesburg, and agreed to give him \$50 if he would assist them in discovering who had taken the hogs. Coakley made an investigation and communicated the result to appellants, the sum of which was that he was informed by Wilkins Second

that appellee had sold two bunches of hogs, one bunch of forty and one of forty-two, and the fact that appellee did not recognize him at the time he saw Coakley talking to Overstreet in Holcum's office, and did not thereafter until the former saw him at Goff's.

On the 18th July, 1893, M. L. Overstreet and Coakley got into a buggy with him and went out north, and they met appellee opposite Frank Goff's barn, who was a brother-in-law of appellee, and there they requested a private interview and went into Goff's barn with him, and there accused him of stealing or of taking, as appellant insists, appellant's hogs, and demanded that appellee pay for them, and that he sign two judgment notes, which Overstreet had taken with him already prepared, one for \$420 and one for \$50, the latter to compensate him for Coakley's fee as detective. Considerable conversation and dispute ensued in regard to this matter, the result of which was appellee signed the larger of the two notes, the one in suit, and Overstreet indorsed a credit on it of \$20 at the time, and the other note was not signed.

What was said and done at this interview was a matter of contention on the trial, Coakley and M. L. Overstreet testifying that appellee admitted, in substance, taking the hogs, but claimed they were not worth so much as appellant, M. L. Overstreet, claimed, but finally signed the note in question. Appellants claim this to have been a conclusive compromise of a disputed claim, made in good faith, especially as to the amount, they claiming appellee virtually admitted his liability for the hogs taken, or a portion of them. The appellee, on the other hand, testified that he did not, at that interview, admit that he took the hogs, but denied it, and claimed that he signed the note in consequence of threats on the part of M. L. Overstreet and Coakley, that they would arrest him and send him to the penitentiary unless he signed the note, and Coakley claimed to have the papers then and there to arrest him, which most influenced him to sign the note. In this, appellee was supported by the testimony of his sister, Mrs. Goff, who claims that she

sat at her west window in the kitchen, and looked in at the east barn door, where she could see the parties, or some of them, and heard a portion of the conversation, which, if her statement is true, goes far to corroborate appellee. Then appellee is corroborated as to some of the particulars, by Frank Gripp, who was carrying water for hayers, and passed the barn, and saw Coakley with a red book in his hand, and held it up as though he was going to read; all the parties were together in the barn; he heard nothing said. This statement corroborates appellee somewhat as to what Cookley did at the time. Appellee testified that Coakley said at the time: "From the confessions you have made to Overstreet, it will send you to Joliet for ten years, and I want you to make this settlement at once, or I will arrest you at the crack of the whip." He stepped back eight or ten feet and said, "I have the papers here that will arrest you, and the papers that will convict you." He held the paper up so that he could see there were three or four inches of writing on it, etc. The appellee produced a number of witnesses by whom he showed that he had, of his own, more hogs than he had sold, and how he obtained them, and by one witness who helped him take the lot of forty-one he had sold to Albert Felt, 1st March, 1893. And he sold another lot of twelve hogs, April 17, 1893, to same party. The evidence shows that the information Coakley received, that appellee had sold one lot of forty and one of forty-two hogs was incorrect. This was a very insufficient foundation on which to base a charge of larceny in the first place; and when appellee accounted for all the hogs he had sold, then there was nothing on which to base even a suspicion, in a reasonable mind, that appellee had taken appellants' hogs.

Appellants had an opportunity, if they could, to show by circumstances or otherwise that appellee was probably guilty, which, had it been done, would have greatly strengthened their case. Appellee informed J. L. Overstreet the next day after the note was signed he would not pay it, and M. L., on the 27th July, the month in which the note was given. He testified he only gave the note to escape

arrest and until he could prove where he got his hogs. The only evidence on which appellants can rely is the supposed admissions of appellee that he took the hogs; and this is contradicted as above stated. The jury had all the evidence and facts and circumstances before them, and reached a conclusion supported, as appears to us, by a great preponderance of the evidence. It is very unreasonable to suppose that a party against whom there was not evidence enough to raise a suspicion in a reasonable mind of the larceny of the hogs would admit the taking of them.

In the excitement, what appellee said could be very easily misunderstood. And under all the circumstances, that he intended to make an admission of guilt is hardly probable.

If appellee did not admit the taking of appellants' hogs, there is nothing in the evidence to support a claim on which to base a compromise. There is no evidence even tending to show that appellee took the hogs in question, unless he admitted it, as claimed by appellant M. L. Overstreet, and his detective witness, Coakley.

Under the circumstances it is so improbable that appellee made such admissions that we think the jury could scarcely have found otherwise than for appellee.

It is insisted on part of appellants' counsel that the issue was not whether the appellee stole appellants' hogs, but it was, did appellants believe appellee had appropriated the hogs, and did appellee admit he had taken some of them. If appellee took the hogs under the circumstances charged, the act was undoubtedly larceny without any mitigating circumstances. It was a cold-blooded, calculating theft. As we have said, aside from the supposed admissions, there was no evidence against appellee.

We think the jury were also fully warranted in finding the issues in the duress of appellee in signing the note in his favor. The fact that M. L. Overstreet went with an officer and took appellee off in a private place was well calculated to impress his mind and create alarm. And the fact that the officer was a paid detective, having \$50 depending on his success, was well calculated to induce the belief in

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the minds of the jury that he would press appellants' demands with great energy, and that appellee's contention that he threatened arrest was more than probable. We can not find any fault with the verdict of the jury in that behalf.

Appellants insist that the court erred in allowing appellee to rebut the charge that he had taken any of appellants' hogs by showing what hogs he sold and what he owned, and where he got them, and to show that he in fact sold his own hogs and not appellants. There was no error in this. While it may not have been a direct issue it had a most important bearing on the question of whether appellants had any claim adequate to support a compromise, and therefore on the issue of want of consideration of the note. It tended directly to support that issue, and it was one of the most important facts in the case on that issue; and if the evidence should clearly show that appellee did not take or steal appellants' hogs it would be very difficult to bring a reasonable mind to the conclusion that he ought to pay appellants for their loss. There would be no justice in his doing so, and it would be very difficult, under such circumstances, for a jury to believe that appellee admitted taking the hogs, or that he signed the note without duress, and unlawful pressure.

The appellants made an attempt to impeach appellee by showing a bad reputation for truth and veracity among his neighbors, and appellee called a large number to show such reputation among his neighbors was good. Some of the witnesses being asked whether they were acquainted with appellee's reputation for truth and veracity in the neighborhood where he lived replied in the negative, while at the same time they had lived in the neighborhood and were well acquainted with him. Then they were asked if they had ever heard anything said against his reputation in that particular among his neighbors. This was objected to by appellants' counsel and the court overruled the objection and the witnesses answered they had not. This is assigned for error. It was undoubtedly erroneous for the court to allow

it. If a witness answer he is not acquainted with a person's general reputation for truth among his neighbors then he should not be allowed to testify further on the subject. But many witnesses seem to understand that in order to be acquainted with one's reputation for truth and veracity it is necessary that he should have heard it often discussed. This, however, is not necessary. It may be known without its being generally discussed. A good reputation excites generally no discussion or comment, yet every one may know that he is generally reputed to be truthful. *Gifford v. The People*, 148 Ill. 173.

It was doubtless this idea that induced counsel to try to make the witness understand what was meant by general reputation, and undertook in a negative way to show that he was acquainted with it and because it had not been discussed it was good. It was irregular for the court to admit this and all like questions, and was error, but we can not see that it was of so serious a nature as to require the judgment to be reversed in consequence. We can not see how the jury could have been seriously misled by knowing that a witness or witnesses had not heard appellee's character for truth discussed among his neighbors, or in fact anywhere. The action of the court in trying to limit appellee's impeaching witnesses by telling his counsel that if he called any more witnesses it would be at his own expense, we do not think erroneous. It is not any intimation by the court that appellee's character for truth had been sustained, only that a repetition of witnesses might not add strength to his support.

Appellants complain of appellee's seventh and ninth instructions.

We do not think they are erroneous. The seventh instruction, taken as a whole, does not tell the jury, as is supposed, that the issue was whether appellee took the hogs of appellants. It tells the jury if he did not take them, it must find for appellee. "Unless it (the note) was given in settlement, as stated in former instructions." The other instruction explained that matter. In the ninth instruction,

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the court tells the jury that to have taken the hogs of appellants, knowing them to be theirs, and appropriating them to appellee's use, was a crime. The jury are not told that anything should follow from that fact. The mere fact that the jury were told the taking of the hogs under the circumstances would be a crime, could not prejudice appellants' case. It was proper for the jury to understand this, as it doubtless would, without any instruction, and to weigh the fact in connection with all other evidence in the case as bearing on the probability of appellee taking the hogs; presumptions are always against the commission of crime. The appellants complain of the refusal of the court to give their rejected instructions seven, eight and nine. Seven and nine have relation to the evidence in regard to appellee's taking the hogs not being on any issue in the case. This evidence was touching a very important matter and the evidence mentioned therein tended to prove a direct issue, and the instructions were too restrictive, and liable to mislead. The eighth offered and refused instruction tells the jury that if appellee did not act as a reasonable man in resisting duress, he can not claim duress in signing the note in suit, and the jury must find in favor of appellants. The note was not indorsed, and his being guilty of carelessness ought not to preclude him from setting up duress as against the payees of the note, and then there was the issue of want of consideration to be tried which the question of duress did not directly affect. The fact, if it was one, that appellee did not act as a reasonable man in yielding to threats in signing the note, might be a circumstance from which the jury might find he did not yield and sign the note on that account, but it is not an estoppel to the plea of duress. The given instructions were all that were necessary to give the jury an adequate idea of the law and the issues it was to try.

Feeling satisfied that substantial justice has been done in the case, and no serious error was committed by the court, the judgment of the Circuit Court is affirmed.

William McCornack v. Peter A. Sornberger.

1. **NEGLIGENCE—Setting Fire to Straw.**—A person owning a barn in which was stabled a stallion belonging to another, carelessly set fire to a straw stack situated thirty-five feet away. The barn was burned, together with the stallion in it. *Held* that the owner of the barn was guilty of negligence and liable to the owner of the stallion.

Memorandum.—Action for damages. Negligently setting fire to straw. In the Circuit Court of Knox County; the Hon. ARTHUR A. SMITH, Judge, presiding. Declaration in case; plea, not guilty; trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 13, 1894.

J. A. MCKENZIE and J. J. TUNNICLIFF, attorneys for appellant.

PRINCE & WELSH, attorneys for appellee.

MR. PRESIDING JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

Appellee sued appellant in an action on the case in the Circuit Court to recover the value of a stallion burned in appellant's barn, where it was being kept by Jennings, a person in charge of the horse. Jennings was occupying the barn as tenant of appellant, the owner of the premises. Near the barn, within thirty-five feet, was a stack of straw containing about thirty to forty tons. The appellant set fire to the stack of straw for the purpose of having it consumed by fire to get it out of the way, while the horse was being stabled in the barn, and it is charged, so negligently watched and attended to the fire that it extended to the barn and burned it and the stallion, an imported horse. The cause was tried by a jury and resulted in a verdict for appellee of \$150, upon which judgment was rendered by the court. From this judgment this appeal is taken and a reversal is asked on several grounds, the main one relied on being that the verdict was manifestly against the weight of the evidence,

though some minor objection as to appellee's instructions is interposed. The facts in the case as offered from the evidence are in substance these: The appellant fired the straw stack on the 18th May, 1892. The fire smouldered in the stack till Sunday afternoon, May 22d, when it was communicated from the stack to the barn in which the horse was at the time, in the absence of all parties, and entirely consumed it and the horse. The defense is, not that the appellant was free from negligence, for it can not be disputed that he was grossly negligent in firing the straw stack so near the barn and in not keeping a stricter watch over it after it was fired, but that appellee was equally negligent with appellant, in keeping the horse in the barn and leaving him and going away while the fire was unextinguished in the straw stack so near to it. The evidence tended to show that on Wednesday, 18th May, appellant set fire to the straw stack and watched it till he thought all danger was over and then went home, and visited it twice or three times afterward, but Jennings saw the straw burning, and on that day moved some things out of the barn he had in there and stayed up all night and watched the fire and left the stallion on Wednesday evening at a neighbor's. Thursday evening he returned without the horse and watched the fire. On Friday and Saturday evening he put the horse in the barn at which time he thought all danger was over. That appellant failed sufficiently to look after the burning straw stack or to take any measures to guard against danger to the barn from the fire in it, still unextinguished; that on Sunday Jennings remained home until two o'clock P. M., when he went to a neighbor's house about a mile away; that before going he examined the burned straw stack and saw no evidence of danger therefrom to the barn; that appellant on the same Sunday afternoon, on his way to church, about three o'clock, passed near the barn and saw smoke arising from the smouldering straw stack but passed on and paid no attention to it; on his return from church at five o'clock P. M. of the same day he saw some smoke and flames arising from the stack, but again passed on without going to it.

The evidence tends to show that at the time appellant saw the smoke and flame on Sunday there was a change of wind from northeast to north and it was blowing quite strongly and had increased about the middle of the afternoon. The barn was seen to be on fire about six o'clock that Sunday evening, and was burned with the horse.

We are of the opinion that there was sufficient evidence from which the jury might lawfully find that the appellee was not in the exercise of ordinary care in leaving the horse in the barn on Sunday and going away, and that appellant was guilty of negligence when, seeing the smoke and flame arising from the burning stack on Sunday in the face of a strong wind, he did not go over to the barn and examine if there was not danger, and in not taking measures to prevent accident, especially after he had so carelessly set the stack on fire. If he had taken this precaution, which we think a reasonably prudent man would have done, under the circumstances, the danger would have been discovered and the burning of the barn prevented.

It is insisted that the evidence shows that Jennings laid a train of straw from the burning straw to the barn and purposely caused it to be burned. We think the evidence entirely fails to sustain such a charge and that the jury was justified in disregarding it.

It is objected that appellee's first and second instructions were erroneous and that the court erred in modifying appellant's instructions Nos. 3, 5 and 6.

We have examined those instructions and the modification of those complained of, and find that the court committed no serious error either in giving or in modifying those instructions. It is not necessary to notice the points in detail; suffice it to say that the instructions as given were fair to appellant.

Seeing no error in the record the judgment of the Circuit Court is affirmed.

Helen M. Safford v. Amos C. Graves, Administrator of the Estate of William Ruste

1. **PROMISSORY NOTES—Payable After the Death of the Maker.**—A promissory note made payable one day after the death of the maker, if otherwise unobjectionable, imports a valuable consideration, and with proof of its execution and death of the maker, makes out a *prima facie* case against the estate of the deceased maker.

2. **SAME—Intended as a Testamentary Bequest.**—A promissory note given by a person, payable after his death, when intended as a mere testamentary bequest, is without valid consideration and can not be enforced against his estate.

Memorandum.—Claim in probate. In the Circuit Court of Kane County, on appeal from the Probate Court of said county; the Hon. HENRY B. WILLIS, Judge, presiding. Trial by the court without a jury; finding and judgment for the defendant; appeal by plaintiff. Heard in this court at the May term, 1894. Reversed and remanded. Opinion filed December 13, 1894.

APPELLANT'S BRIEF, BOTSFORD & WAYNE AND M. O. SOUTHWORTH, ATTORNEYS.

The note is good in form and substance, and, *prima facie*, shows a valid subsisting cause of action against said estate. Its production by the plaintiff on the trial, without any proof to impeach its consideration or validity, entitled the plaintiff to a judgment for the principal and interest shown by the note to be due. Burnap v. Cook, 32 Ill. 168; Farwell v. Meyer, 35 Ill. 40; Gordon v. Adams, 127 Ill. 223.

The note is an absolute promise to pay money, for value received, and on its face purports a good and valuable consideration, and can only be attacked by direct and positive proof. Hoyt v. Jeffray, 29 Ill. 104; Hill v. Todd, 29 Ill. 101; Randolph on Commercial Paper, Secs. 562-563.

Although made payable one day after the death of the maker, it is as valid a note as if made payable on a fixed day. Randolph on Commercial Paper, Sec. 113; Goodwin v. Goodwin, 65 Ill. 497; Worth v. Case, 42 N. Y. 362.

If for any cause the consideration for the note is wanting,

inadequate, or has in any manner failed, the burden of proof is on the defendant to show that not only no action can be maintained on it, but if recovery might be had *pro tanto*, then to show by the evidence the extent and amount of such recovery. In other words, the *onus* of proof is on the defendant to impeach the consideration in whole, or to some certain and definite extent. *Parish v. Stone*, 14 Pick. (Mass.) 198; *Eich v. Sievers*, 73 Ill. 194; *Guild v. Belcher*, 119 Mass. 257.

A. J. HOPKINS, N. J. ALDRICH and F. H. THATCHER, attorneys for appellee.

MR. JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

Appellant filed in the County Court of Kane County as a claim against the estate of Wm. H. Ruste the following note :

"\$5,000.

AURORA, Illinois, August 17, 1877.

One day after my decease I promise to pay to the order of Helen M. Safford the sum of five thousand dollars, with interest after due. Value received.

(Signed) Wm. H. RUSTE."

In the County Court she recovered \$2,000, and in the Circuit Court on appeal she recovered a judgment for the full amount of principal and interest. The administrator of the estate appealed from the last mentioned judgment, which was by this court reversed at the May term, 1891, and the case remanded to the Circuit Court. See 41 Ill. App. 659.

The case was redocketed in the Circuit Court and when tried again, judgment was rendered in favor of the administrator.

On the trial, appellant, to sustain her claim, offered in evidence the note, proved its execution and delivery and the death of Ruste. The administrator offered no evidence but relied upon the opinion of this court reported in 41 Ill. App. for a judgment in his favor.

The introduction of the note with proof of its execution

Safford v. Graves.

and delivery and proof of the death of Ruste made a *prima facie* case for appellant. The note on its face purports a valuable consideration. Although made payable one day after the death of the maker, it is as valid as if made payable on a fixed day. *Goodwin v. Goodwin*, 65 Ill. 497; *Worth v. Case*, 42 N. Y. 362.

Appellee contends, however, that the finding and judgment of the Circuit Court is right because this court in its former opinion held that the note was in the main, shown to have been intended as a testamentary bequest merely, and that in so far as it was of that nature, and without valid consideration, it could not be enforced, and that the instrument was permitted to stand only for the purpose of enabling appellant to show whether an obligation had been incurred by the intestate for board and accommodation which had not been paid. In other words, that the decision of this court concluded appellant from all proof except to show whether anything was due for board and accommodation, and if so, how much.

The contention of appellee is untenable. True, this court in its former opinion said it was apparent the note was intended in the main as a testamentary bequest, and that in so far as it was of that nature and without valid consideration it could not be enforced, yet that was given as a reason why the judgment was against the evidence; but the judgment of this court was that the judgment of the Circuit Court be reversed and the cause remanded for another trial. When remanded the case stood just as though it had never been tried. The court gave no directions to the Circuit Court, and could give none, as it is a case where parties were entitled to a trial by jury, and might introduce any competent evidence to maintain the issue, irrespective of what was introduced upon the trial, which resulted in the judgment reversed.

The judgment must be reversed and the cause remanded for another trial.

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City of Joliet v. Patrick Looney.

1. CITIES AND VILLAGES—*Defects in Sidewalks—Notice to Policemen.*—Where the policemen of a city or village are charged with the duty of reporting defects in sidewalks, notice of such a defect to one of their number is notice to the city or village.

2. SAME—*When Notice to a Policeman is Notice to the City.*—Where the policemen of a city or village, with the knowledge and approval of the officers having general charge of municipal affairs, had been for several years charged with, and had been performing the duty of inspecting sidewalks and reporting defects therein, by which the agencies for their repair were set in motion, notice to a policeman is notice to the city or village.

3. INSTRUCTIONS—*Right of the Court to Give After the Jury Have Left the Bar.*—Where there is an omission to instruct the jury upon a question, material in determining the case, the court may, if equal opportunity is given to each side, submit further instructions.

4. SAME—*Sending to the Jury Room—Objections.*—An objection that an instruction was sent to the jury room and not given in open court, can not be made for the first time in the Appellate Court; if not made at the time in the court below, it is waived.

Memorandum.—Action for personal injuries. In the Circuit Court of Will County; the Hon. DORRANCE DIBELL, Judge, presiding. Declaration in case; plea of not guilty; trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 18, 1894.

APPELLANT'S BRIEF, JOHN W. D'ARCY, ATTORNEY.

As to the rule requiring sidewalks to be kept in reasonably safe condition for the use of the public, see *Jefferson v. Chapman*, 127 Ill. 446; *Mt. Vernon v. Brooks*, 39 Ill. App. 433; *Brownlee v. Alexis*, 39 Ill. App. 135; *Murphysboro v. O'Riley*, 36 Ill. App. 160.

Whenever a street becomes unsafe, a city is not liable unless it has notice, or unless such lapse of time has intervened that in the exercise of reasonable care and diligence it would have known of the defect and might have made the necessary repairs. *Hoopestown v. Eads*, 32 Ill. App. 78.

Notice to the street commissioner is notice to a city. *Brownlee v. Alexis*, 39 Ill. App. 144.

City of Joliet v. Looney.

Question of notice to a city is one of fact for the jury. *Kuntzell v. City of Chicago*, 37 Ill. App. 326; *Chicago v. Fowler*, 60 Ill. 322; *Powers v. Chicago*, 20 Brad. 178.

J. L. O'DONNELL, attorney for appellee.

MR. JUSTICE CARTWRIGHT DELIVERED THE OPINION OF THE COURT.

The record of a judgment in this suit in favor of the present appellant against appellee was brought to this court at a former term by writ of error, and that judgment was reversed and the cause remanded. The case was reported as *Looney v. City of Joliet*, 49 Ill. App. 631. After reinstatement in the Circuit Court the case was again tried, resulting in a verdict for appellee for \$1,500, and judgment was entered for that amount and costs.

The evidence on the last trial as to the defect and the accident was the same as before, and the important questions of fact related to the question of notice, express or implied, to defendant of the defect, and to the extent of plaintiff's injuries. The evidence introduced to prove notice to the defendant of the defective condition of the stone, either on account of the existence of such condition for such length of time that knowledge would be implied, or from actual information, consisted of testimony that one who worked in the store in front of which the stone was located, noticed six weeks before the accident that the stone was cracked and was shaking every day when he stepped on it; that when a policeman of defendant passed over it a couple of days before the accident it shook under his heel, and he examined it with his lantern and reported to a police captain at the station, telling him that he had better put it in the record and have the street commissioner look after it; that a police captain on duty on the evening of the accident was notified of the defect, and that for several years it had been one of the duties performed by the police to report all defective sidewalks found by them and enter the same in a record kept at the police station for that purpose, to which

the superintendent of streets was accustomed to go for information as to such defective sidewalks. On the other hand the defendant proved that a number of persons, accustomed to pass over the stone frequently, had not noticed the defect, and the police captain denied that the policeman reported the defect to him a couple of days before the accident, and testified that such report was after the stone fell.

The evidence would justify the jury in a finding that the defect had existed for six weeks or more, and that the defendant, by the exercise of reasonable care, would have discovered and remedied it; but the court gave an instruction under which they might find from the evidence that the defendant also had actual notice of the defect, and the rulings on the evidence were in harmony with the instruction. Most of the argument for the appellant is directed to the question whether actual notice could be given to the defendant in the manner stated in the instruction and shown by the evidence. The instruction is as follows: If you believe, from the evidence, that plaintiff was injured by a defect in the sidewalk of defendant, as alleged in plaintiff's declaration, and if you further believe that for several years prior to and at the time of such injury, with knowledge and approval of the superintendent of streets, a book was kept at the police station, in the city of Joliet, in which policemen were directed to note defects in sidewalks, and that the policemen of said city were charged with the duty of examining and reporting to their departments, defects in the sidewalks observed by them for the benefit of the superintendent of streets, and that at that time the superintendent of streets was accustomed to resort to said book and to the reports of said policemen for information concerning defects in sidewalks, and that one or more of the policemen in the employ of defendant, noticed the defect in the sidewalk so long before the time of the injury that there was time, in the exercise of ordinary care, to report and repair said defect, then such notice to the city of Joliet, and the failure to remedy the defect within a reasonable time after such notice, would constitute negligence on the part of the defendant.

We do not think the instruction objectionable. In reversing the former judgment, we held, in substance, that if the police, with the knowledge and approval of the officers having general charge of the affairs of defendant, had for several years been charged with, and had been performing the duty of inspecting sidewalks and reporting defects therein by which the agencies for their repair were set in motion, then notice of the defect to a policeman would be notice to the defendant. The conditions recited in the instruction could not have existed and the duty have been imposed and performed for several years without the concurrence of the police department as well as the superintendent of streets, and the knowledge and approval of the mayor, who was by law and ordinance the head of the police department and had general charge of the affairs of the city. The city council and all those having such general charge could not have been ignorant that the police were acting for the city in the inspection of sidewalks and reporting defects, and under the decision heretofore made, notice to one so acting would be notice to defendant.

Objection is also made to the giving of the instruction at the time it was given. The question of notice through police officers was an important one, and the record shows that the respective counsel in their arguments to the jury, made opposite assertions as to the law on the subject. No instruction was given stating the law as to the notice before the retirement of the jury, and after such retirement the court stated to counsel that the jury had not been treated fairly in that particular and should have been instructed on that question. The court requested counsel on each side to prepare instructions accordingly, and the instruction in question was drawn on the part of the plaintiff. At the request of defendant's attorney, the court did not act in the matter until the next day, when said attorney declined to prepare any further instruction, and filed eleven written objections to further instruction being given and asked the court to give the instructions offered by him and refused on the trial. Thereupon the court sent the instruction to the jury. The

objections to instructing the jury at that time, when equal opportunity was given to each side to submit further instructions, are without force.

It is also objected that the instruction was sent to the jury room and not given in open court, but the record recites that counsel for the defendant made no objection to the court sending the instruction to the jury room, and requested the court to send to the jury room his refused instructions. The objection is, therefore, not available now, as it was waived.

It is also urged that the damages allowed were excessive. The plaintiff fell on his shoulder, and there was swelling and an abrasion of the skin, which disappeared, but he claimed that he could never use the arm afterward on account of severe pain in it and down his back, and that he could not lie on that side. He had been a strong, healthy man, and worked regularly up to the accident but never worked afterward. He had been treated by a doctor and examined by that doctor and others, who testified that there were no visible changes in the shoulder, but that he seemed to suffer pain if the arm was raised. The doctors, of course, could not feel his pain or see it, but his statements appeared truthful and the physical manifestations of pain genuine. We are not able to say that the jury awarded excessive damages. The judgment will be affirmed.

P. O. Krans & Co. v. Luthy & Co.

1. *PARTNERSHIP—Liability of a Person Holding Himself Out as a Partner.*—The theory under which a person, not a partner, can be held liable for a partnership debt because he has held himself out as a partner, does not apply where the credit has been given with a full knowledge that such person was not a partner, and the person giving the credit has not been misled by his misrepresentations.

Memorandum.—Assumpsit. In the Circuit Court of Henry County; the Hon. JOHN J. GLENN, Judge, presiding. Declaration, common

counts; plea of general issue and denial of joint liability; trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1894. Reversed and remanded. Opinion filed December 18, 1894.

APPELLANTS' BRIEF, N. F. ANDERSON, ATTORNEY.

The following principles must be complied with in instructing upon estoppel *in pais*:

There must be representation of a material fact. 2 Pomeroy Eq. Jur., Sec. 805. The acts of language must reasonably import membership in a firm; the question is, what does the language used import, and not what interpretation the creditor placed upon it. 1 Bates on Partnership, Sec. 99. Where reliance is placed upon inquiries, the latter must have been clear, and not misleading. Kinney v. Whiton, 44 Conn. 262; Tillotson v. Mitchell, 111 Ill. 518; Pierce v. Andrews, 6 Cush. (Mass.) 4; Durant v. Pratt, 55 Vt. 270.

The representation must be plain and certain. Tillotson v. Mitchell, 111 Ill. 518; Moors v. Albro, 129 Mass. 9.

The truth concerning the facts must be unknown to the other party claiming the benefit of the estoppel, when such conduct was done, and at the time it was acted upon by him. 2 Pomeroy, Eq. Jur., Sec. 805; Powell v. Rogers, 105 Ill. 318; 7 Am. & Eng. Ency. of Law, 13.

If at the time when he acted, such party had knowledge of the truth, or had the means by which with reasonable diligence he could acquire knowledge, and neglected to do it, he can not claim the benefit of the estoppel. 2 Pomeroy Eq. Jur., Sec. 810.

Omission to give notice works no estoppel in favor of one aware of the facts. Hutchins v. Hubbard, 34 N. Y. 24.

A party can not rely on a representation when he knows the truth. Bigelow v. Henninger, 33 Kan. 362; Nettle v. Newcomb, 31 Barb. 169; 22 N. Y. 249.

The conduct must be such as would reasonably lead to the results complained of. Hefner v. Vandolah, 57 Ill. 520.

C. C. WILSON, attorney for appellees.

MR. JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This suit was brought by Luthy & Co., wholesale dealers in agricultural implements, against P. O. Krans and John P. Chaiser, partners, doing business at Galva, Ill., under the firm name of P. O. Krans & Co. to recover for goods sold and delivered.

In addition to the general issue, Chaiser filed a plea denying the partnership and joint liability charged in the declaration. Upon the trial the entire contest was upon the issue raised by this plea. The jury returned a verdict in favor of the plaintiff for \$811.20, and made two special findings, one that Chaiser was not an actual partner with Krans in the agricultural implement business, and the other that Chaiser held himself out as a partner of Krans. After a remittitur of \$7.50 from the verdict was entered, and a motion for a new trial was overruled, the court rendered judgment for \$803.70. Chaiser prosecuted this appeal.

It appears from the evidence that Krans and Chaiser on the 3d of November, 1892, formed a partnership for the grocery and hardware business, and bought from one A. W. Soper a stock of goods situated in a store at Galena. For two years prior to such purchase, Krans had been carrying on the agricultural implement business in a building near where Soper had been carrying on his business. The firm of P. O. Krans & Co. continued but a short time, Chaiser selling his interest to one John Wibery on the 25th of January, 1893, when the firm of Krans & Wibery was formed.

On the 16th of November, 1892, Krans, to replenish the agricultural implement stock, ordered of J. G. Delent, the traveling salesman of Luthy & Co., goods amounting to \$2,200, and also made another order on the 16th of January, 1893, through the same agent. Krans signed the order in the firm's name of P. O. Krans & Co., in the absence and without the knowledge of Chaiser. This action was brought to recover unpaid balance for the goods delivered on those orders.

Chaiser denied on oath that his partnership with Krans

Krans & Co. v. Luthy & Co.

included the agricultural implement business, and denied that he had any interest in it. The jury so found, and we think rightfully.

As soon as Chaisher discovered that the order of November 16, 1892, had been given in the partnership name, he, on November 23d, wrote Luthy & Co. informing them that he was not in partnership with Krans in the implement business.

On the day that the second order was made, Delent met Chaisher. He testified that he told Chaisher that he had come to do business with them, to which Chaisher replied, that whatever he did with Krans was all right. This conversation was denied by Chaisher. At all events Delent knew and his firm knew at that time that Chaisher had written Luthy & Co. that he was not a partner with Krans in the agricultural implement business. The theory under which a person not a partner can be held liable for a partnership debt because he held himself out as a partner does not apply where the creditors extended credit with full knowledge that he was not a partner and was not misled by his representations.

We do not think the evidence in this case supports the second special finding returned by the jury.

The court instructed the jury that if Delent was at the place of business of P. O. Krans & Co. for the purpose of selling goods, and the attention of Chaisher was called to that fact, and Chaisher told Delent that whatever was done with Krans would be all right, then Chaisher would be liable with Krans to pay for the goods. The instructions on that point entirely ignored the fact that the plaintiff had been notified that Chaisher was not a partner with Krans in the implement business. Under the first instruction given the jury could find for the plaintiff even though full notice had been given of the relation between Chaisher and Krans and the plaintiff was not at all misled by the alleged statement to Delent.

For the error in giving improper instructions and because we do not think the second special finding of the jury is sustained by the evidence, the judgment must be reversed.

Kankakee Water Works Company v. Joseph Irwin.

1. **SEWERS—*Damages for Obstructing.***—The Kankakee Water Works in laying a water pipe injured and obstructed plaintiff's sewer (which he had, under the authority of a resolution of the city council, laid in the street, from his house to the river), so that the sewage flowed back into his cellar. *It was held* that he was entitled to recover such damage as he could show he had sustained.

Memorandum.—Action for damages. In the Circuit Court of Kankakee County; the Hon. CHARLES R. STARR, Judge, presiding. Declaration for obstructing a sewer; trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 18, 1894.

WHEELER & HUNTER, attorneys for appellant.

EDWARD E. DAY, attorney for appellee.

MR. JUSTICE CARTWRIGHT DELIVERED THE OPINION OF THE COURT.

Appellee brought this suit against appellant and alleged in his declaration that appellant negligently and improperly laid its iron water pipe in a street of the city of Kankakee, in such manner as to break into and stop up the sewer of appellee laid by permission of said city in said street from his dwelling house, and to cause the sewer drainage and refuse matter to flow back into his cellar, making his family sick, causing an expenditure of \$500 in curing them, making his well foul, causing the walls of his house to crack and settle, rendering the premises wet and unwholesome and interfering with his comfort. There was a plea of the general issue and a trial resulting in a verdict for appellee for \$275, on which judgment was entered.

It is first urged that the evidence did not connect the sickness in plaintiff's family with the condition of the cellar produced by defendant's act. Plaintiff's sewer extended from his house to Kankakee river with quite a sharp decline,

carrying the drainage from the house, including a water closet and a bathroom, and had always worked well. Defendant laid its water pipe across the sewer and either in laying it, or as a consequence of the water pipe settling, the sewer pipe was broken and stopped up and plaintiff's cellar became filled with sewerage to the depth of twenty inches or two feet. The water pipe was laid in November or December, 1892, and the dampness and offensive smell in the cellar began about a month after, so that it is probable that the cause of the stoppage was the settling of the water pipe. From January 17, 1893, plaintiff's family were sick for several months. They had chills and fever, bilious troubles of a malarial origin, rheumatism and diphtheria. During four months a physician was in attendance upon them, averaging once a day for the whole period. Plaintiff's son had rheumatism before, and his trouble was not due to the sewerage, but no other cause was shown for the existence of the other diseases, and it was proved that conditions like that existing in the cellar were an efficient cause for their presence. While it was proved that diphtheria was contagious, and that it was prevalent in the same city, it was not shown that any of plaintiff's family were exposed to contagion. The jury were warranted from the coincidence of disease and a sufficient cause, in finding that the disease resulted from that cause, in the absence of any evidence of a different cause. It is matter of common knowledge that the gases and foul odors generated under the conditions created in plaintiff's cellar and distributed through his dwelling house not only destroy the comfort of a family, but that disease originates from such sources.

It is also claimed that the rule laid down by the court for the assessment of damages was erroneous, and that the damages allowed were excessive. The third instruction given at the request of plaintiff stated that it was not necessary that any witness should have expressed an opinion as to the amount of plaintiff's damages, but the jury might themselves make such estimate from the facts and circumstances in proof, and by considering them in connection with their own

knowledge, observation and experience in the business affairs of life. The instruction applied to all the damages sustained, and included among the damages proved were moneys paid by plaintiff to various doctors for medical treatment of his family and to druggists for medicines and also damage to his house by soaking the foundation and causing the walls to settle and crack. These damages were not proper subjects of estimate by the jury from their knowledge, observation and experience, which would not enable them to say how much plaintiff paid doctors and druggists, or what the cost of repair or injury to value might be. We regard the giving of the instruction as harmless error in this case, however, because, while there was no evidence from which the jury could fix the amount of damage to the building, there was evidence of the amount of the doctor's bills and drugs, which equaled the amount of the verdict, and, taken with other damage not susceptible of exact proof and which the jury should estimate under the rule stated in the instruction, made the verdict in any view of the evidence less than the damage proved after eliminating any expense included on account of rheumatism. It is objected that the fifth instruction given for plaintiff was broader than the declaration in permitting a recovery for any damage resulting from sending the sewerage back into plaintiff's cellar, whether alleged in the declaration or not, but there was no evidence of any damage except such as was alleged, and therefore the instruction could not have had the effect of including such damage in the verdict.

The last point made is that the plaintiff was a trespasser in the street and defendant was rightfully there, and therefore plaintiff could not maintain his action. Permission was given to plaintiff to put in the sewer by resolution of the city council March 12, 1888, and it had been laid over four years at the time defendant broke and stopped it up. The license so given had never been revoked, and the ordinance under which defendant laid its pipes provided that they should not interfere with existing sewers. We see no merit in the argument on that question. The judgment will be affirmed.

W. M. Durham v. W. C. Evans.

1. **DAMAGES**—*Defendant Can Not Complain that They Are Too Small.*—When the evidence shows that the jury could, and ought to have allowed a greater sum as damages than they did, it is, nevertheless, a matter about which the defendant can not complain.

2. **INSTRUCTIONS**—*Must Charge the Jury to Find from the Evidence.*—An instruction which omits the requirement to find from the evidence is bad, but when the other instructions for the same party contain the requirement, and direct the jury to be governed solely by the evidence, it is not reversible error.

Memorandum.—*Assumpsit.* In the Circuit Court of Kankakee County; the Hon. CHARLES R. STARR, Judge, presiding. Declaration, special and common counts; trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 18, 1894.

STEPHEN R. MOORE, attorney for appellant.

DANIEL H. PADDOCK, attorney for appellee.

MR. JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

Appellee, a real estate agent, brought this suit against appellant to recover one-half of commissions and profits in the sale of certain lands.

A trial by jury resulted in a verdict and judgment for \$740 in favor of appellee.

While it is claimed that the court committed errors in ruling upon evidence and instructions, the chief contention of appellant is that the verdict is against the evidence.

There is a sharp conflict in the testimony, but we think a preponderance establishes the following facts:

Early in 1891, appellant engaged appellee to negotiate the sale of a section of land of which he then owned 440 acres, and other parties owned 200 acres. Appellee soon made a contract for its sale with Rankin, Whitham & Co., and took a contract from appellant for \$1,060 for his services. The trade with Rankin, Whitham & Co. was not consummated,

however, because of their failure to meet their obligations, for which failure appellant sued that firm and afterward compromised the suit for \$1,000. For his services in that deal appellee was paid \$500 and surrendered his contract for \$1,060. After the trade with Rankin, Whitham & Co. failed, appellant purchased from the other owners the 200 acres held by them in the section, put a price of \$15 per acre on it, and again engaged appellee to sell it, agreeing that if he would use his best endeavors to negotiate a sale he should have one-half of all the land sold for over \$15 per acre whether sold by appellee or appellant. Appellee spent considerable time and money in advertising the land and hunting buyers. Appellant sold it for \$20 per acre. There were other deals between the parties relative to the sale of other lands for which appellee claimed commissions, but it is unnecessary for us to speak of them in detail. Not only was appellee entitled to the amount allowed him by the jury, but much more.

Appellant claims that in any view of the evidence appellee is entitled to recover \$1,930, or he is not entitled to recover anything. We think, ourselves, that the jury erred in the matter of damages. They should have placed them at a higher figure. It does not seem that appellant should complain on that score, however.

The eighth instruction given for the plaintiff omits the requirement of belief from the evidence by the jury and is bad for that reason, but the other instructions for the plaintiff contain the requirement, and the seventh given for the defendant directs the jury to be governed solely by the evidence. We do not think the jury were misled by that opinion in the instruction.

The court committed no error in refusing the two refused instructions offered by appellant nor passing upon evidence. Judgment affirmed.

City of St. Charles v. Mary Hannon.

1. **NEGLIGENCE**—*A Question for the Jury*.—The question whether a particular act under all the surrounding circumstances is negligence, is not one of law but of fact for the jury.

2. **VERDICTS**—*When Not to be Disturbed*.—The verdict of a jury will not be disturbed unless it is manifestly at "first blush" against the evidence.

3. **APPELLATE COURT PRACTICE**—*Errors to be Pointed Out*.—Where an appellant assigns for error certain matters in a general way, but does not point them out in his brief so that it may be known wherein the error, if any, consists, the court will conclude that the assignment is not relied on.

Memorandum.—Action for personal injuries. In the Circuit Court of Kane County; the Hon. HENRY B. WILLIS, Judge, presiding. Declaration in case; plea of not guilty; trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 13, 1894.

J. FRANK RICHMOND, attorney for appellant; A. H. BARRY and W. C. HUNT, of counsel.

A. J. HOPKINS, N. J. ALDRICH and F. H. THATCHER, attorneys for appellee.

MR. PRESIDING JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

The appellee recovered in this case a judgment against appellant for damages resulting to her by reason of a fall on its sidewalk which it failed to keep in ordinary good repair, or to exercise care to do so, and of which defective condition it had notice by the lapse of time after it was in an unsafe condition.

The verdict was for \$2,000, and the court gave judgment thereon. From this judgment this appeal is taken.

It appears that on the 19th November, 1892, appellee, accompanied by her daughter Jessie, had been down town from her residence, and on returning and in passing on the

south side of Illinois street on appellant's sidewalk, fell and received the injury complained of. The daughter was walking in front and stepped on a loose plank in the sidewalk, causing it to tip up and tripped appellee, and she fell over against the fence and received the injury in question. It was a dark night. The appellee was then *enciente*, and in consequence suffered a miscarriage, and was sick for weeks and her life was despaired of, and she was left with a weakness which continued to the time of trial and the evidence shows was of a permanent character. Appellant's counsel admits that the evidence clearly shows that the sidewalk where the injury occurred was in a bad condition and had been so bad for a number of years. We need not, therefore, notice the evidence touching the question of the negligence of appellant in failing to keep its sidewalks in a safe condition. We will only notice the defense set up that appellee was aware of the condition of the walk, and by traveling over it was guilty of such contributory negligence that she can not recover.

We can not agree with counsel for appellant that it was contributory negligence *per se* for appellee to undertake to travel over the sidewalk, knowing its bad condition, or that the court erred in not giving its offered instructions to the jury to that effect. The question whether such an act, under all the surrounding circumstances in the case, was negligence on appellee's part, was a question for the jury and not a question of law. This principle of law has been so often decided by the Supreme Court and this court we need not comment on it. We will simply cite some of the cases. *St. Louis Bridge Co. v. Miller*, 138 Ill. 465; *City of Aurora v. Hillman*, 90 Ill. 61; *City of Bloomington v. Chamberlain*, 104 Ill. 273; *City of Sandwich v. Dolan*, 141 Ill. 430; same in 42 App. 53. It is unnecessary to cite other cases.

It then became merely a question of fact for the jury to determine from all the evidence in the case whether appellee exercised reasonable care in going on the sidewalk in question, knowing it to be out of repair. It is a well settled rule of law that the verdict of a jury will not be dis-

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turbed unless it is manifestly at "first blush" against the weight of the evidence. From a perusal of the evidence we are satisfied such is not its condition here. The walk was a public one over which travel was invited by appellant and was the usual route for appellee to travel in going and returning from "down town." There was really no other practicable way to go into the city. She used ordinary care in traveling over it and but for her daughter stepping on the end of a loose board in the walk and tipping it up the accident would not have happened. We think the evidence supported the verdict in this particular. We think, also, the verdict is supported by the evidence in regard to appellee's care of herself before and after the injury, and in all other particulars.

The appellant assigns for error that the court refused to give its instructions Nos. 5 and 6 offered, but modified the same, as appears in instructions Nos. 7 and 8.

There is no error pointed out in its brief, so that we may know wherein such error, if any, consists.

We conclude, therefore, that this assignment of error is not seriously relied on and will not undertake to search out such error ourselves. The record before us appears to be remarkably free from error. There is no complaint made that the damages are excessive. The judgment of the Circuit Court is therefore affirmed.

Lewis E. Dillman et al. v. John W. Nadelhoffer.

1. CREDITOR'S BILL—*Where it Lies—Legal Remedies to be Exhausted.*—Where a creditor simply seeks to obtain satisfaction of his judgment out of some equitable estate of the judgment debtor, which is not liable to levy and sale under an execution at law, he must exhaust his remedy at law by obtaining judgment and having an execution issued and returned unsatisfied, before he is entitled to relief from a court of equity.

2. BILL IN AID OF EXECUTION—*Exhaustion of Legal Remedies Not Necessary.*—Where a creditor seeks to remove a fraudulent conveyance out of the way of his execution at law, he may file his bill in aid as soon

as he obtains a judgment, without waiting to exhaust his legal remedies.

8. **FRAUDULENT CONVEYANCES**—*Voluntary Transfers by a Person in Debt*.—A voluntary conveyance made when the grantor is in debt, is presumptive evidence of fraud, and a fraudulent intent will be presumed from the fact that the party conveying was indebted at the time, and that as to pre-existing creditors every conveyance not made on a consideration valuable in law, is void.

Memorandum.—Bill to remove a fraudulent conveyance and in aid of an execution. In the Circuit Court of Will County; the Hon. CHARLES BLANCHARD, Judge, presiding. Decree for complainants; appeal by defendants. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 13, 1894.

APPELLANTS' BRIEF, GEORGE S. HOUSE, ATTORNEY.

A voluntary settlement, otherwise good, will not be rendered invalid by an unsuccessful attempt to prove a valuable consideration. *Lucas v. Lucas*, 103 Ill. 121.

The owner of property may at any time give the same to any one he chooses, so long as he thereby injures no then existing creditor, and no subsequent creditor can call it in question, unless the donor is guilty of an actual fraudulent intent, and such creditor is thereby injured. This follows from his absolute dominion over his property, and the mere fact that he may be indebted is not alone sufficient to make a gift or voluntary conveyance by him inoperative. If there is no intention on his part to delay or defraud his creditors, the conveyance is not within the statute. *Bump on Fraudulent Conveyances*, 269.

It is not conveyances where a man owes that are prohibited, but conveyances with the intent or purpose to delay, hinder or defraud creditors. *Lyne v. Bank of Kentucky*, 5 J. J. Marsh. 545; *Clayton v. Brown*, 17 Ga. 217; *Taylor v. Eubanks*, 3 A. K. Marsh. 239, and *Hunter v. Waite*, 3 Gratt. 26.

The presumption of an intent to delay, hinder and defraud creditors, arising from a voluntary conveyance by a person who is in debt, is not conclusive, for such a conveyance is fraudulent only where it necessarily delays, hinders or

defrauds them. Indebtedness, therefore, is only one circumstance from which an inference of an intent to defraud may be drawn, and must be considered in connection with the donor's estate. Mere indebtedness alone is not sufficient to render a voluntary conveyance void, if the donor has ample means left to pay his debts. *Bump on Fraudulent Conveyances*, 275; *Moritz v. Hoffman et al.*, 35 Ill. 553.

No creditor without a lien has any right to complain that his debtor is giving away property to his wife or children, unless such creditor can establish the fact that he has not retained enough to satisfy existing debts. Such grantor must make himself insolvent by such gifts or conveyances, and to impeach them fraud must be charged and proved. When there is no actual fraudulent intent, and the gift or provision made by a debtor to his wife or child is a reasonable one under the circumstances, leaving ample property unincumbered for the payment of the party's debt, not materially lessening their then prospects of payment, the gift or provision will be sustained as valid. *Wyck v. Seward et al.*, 6 Paige 62; *Emerson v. Bemis*, 69 Ill. 537; *Fanning et al. v. Russell et al.*, 94 Ill. 386; *Patrick v. Patrick*, 77 Id. 555; *Sweeney et ux. v. Damron et al.*, 47 Id. 450; *Matthews et al. v. Jordan et al.*, 88 Id. 602; *Lincoln v. McLaughlin*, 74 Id. 11; *Faloon v. McIntyre*, 118 Ill. 292-300.

If the act done will necessarily have the effect of hindering and delaying creditors, the law presumes that it was done with that fraudulent purpose and intent. *Moore v. Wood et al.*, 100 Ill. 451; *Emerson v. Bemis*, 69 Ill. 537; *Larkin v. Aird*, 6 Wall. 78; *Bump on Fraudulent Conveyances*, 246-282.

The law, however, admits of qualifications as against existing creditors, when, as said by Mr. Justice Story, the circumstances of the indebtedment and conveyance repeal any presumable imputation of fraud. 1 Story's Eq. Jur., Sec. 355.

The mere fact of indebtedness will not amount to a prohibition of the debtor's power to make a gift, or provide for his future support or the support of others. If the debtor

retains property amply sufficient for the payment of all his debts, he has a right to contract for his support for a longer or shorter period, as he may think best. *Hapgood v. Fisher*, 34 Me. 407; *Wooten v. Clark*, 23 Me. 75; *Parker v. Nichols*, 7 Pick. 52; *Bump on Fraudulent Con.*, 247; *Annis v. Bonar*, 86 Ill. 128.

APPELLEE'S BRIEF, HILL, HAVEN & HILL, ATTORNEYS; HALEY
& O'DONNELL, OF COUNSEL.

A creditor who seeks to remove a fraudulent conveyance, incumbrance or obstacle of any kind out of the way of his execution, may file his bill as soon as he obtains judgment. Where he simply seeks to satisfy his debt out of some equitable estate of the defendant which is not liable to a levy and sale under an execution at law, he must exhaust his remedy at law by obtaining judgment and having an execution returned *nulla bona*, before he can come into a court of equity for the purpose of reaching equitable assets of the defendant; but where, as in this case, the creditor seeks only to remove fraudulent incumbrances out of the way of his execution, he may file his bill as soon as he obtains his judgment. *Miller et al. v. Davidson*, 3 Gilm. 522; *Weightman v. Hatch*, 17 Ill. 286; *Newman v. Willetts*, 52 Ill. 98; *Beebe v. Saulter*, 87 Ill. 518; *Wisconsin Granite Co. v. Gerrity et al.*, 144 Ill. 77.

Section 4, chapter 59, R. S., makes a fraudulent transfer of property void as against creditors. The word creditors, as used in the statute, is not to be taken in its strict technical sense, but applies to all persons who had demands, accounts, interest or causes of action for which they might recover any debt, damages, penalty or forfeiture in actions either *ex delicto* or *ex contractu*. Such demand may be either absolute or contingent. A liability as surety is as much within the statute as a liability as principal. *Bump on Fraudulent Conveyances*, 502-508; *Walrapt et al. v. Brown*, 1 Gilm. 397; *Bongard v. Block*, 81 Ill. 186; *Woolridge et al. v. Gage et al.*, 68 Ill. 157; *Dunphy v. Gorman*, 20 Ill. App. 132.

The general rule of law is that a voluntary conveyance or transfer of property by a debtor as against existing creditors, is fraudulent and void, and it is immaterial whether actual fraud was intended or not. If the effect of such a conveyance or transfer is to hinder and delay creditors, the law presumes that it was done with fraudulent purpose and intent. To this general rule there are qualifications. For instance, a husband and father may set apart by conveyance or transfer for the use of his wife and children a reasonable portion of his estate for their support, if he retain ample property in his possession, free from incumbrance and accessible to his creditors, sufficient to pay all his debts without hazard. Such a conveyance or transfer will not be upheld if there be not ample property retained or if the amount conveyed or transferred will materially lessen the debtor's ability to pay his debts. *Emerson v. Bemis et ux.*, 69 Ill. 537; *Patterson v. McKinney*, 97 Ill. 41; *Marmon v. Harwood*, 124 Ill. 104; *Harting v. Jockers*, 136 Ill. 627; *Wisconsin Granite Co. v. Gerrity et al.*, 144 Ill. 77; *Austin v. National Bank*, 47 Ill. App. 224.

The rule as laid down by the earlier authorities in this State seems to have been predicated upon the theory that in order to vitiate such a conveyance it was necessary to show the insolvency of the grantor at the time the conveyances were executed. Of late years there has been a departure from that doctrine, and the rule has been modified considerably. It now seems to be well settled that such voluntary conveyances, as against existing creditors, are fraudulent and void where the grantor fails to retain ample and available property sufficient to discharge all his existing debts. *Marmon v. Harwood et al.*, 26 Ill. App. 341; *Crawford v. Logan*, 97 Ill. 396; *Nicholls v. Wallace*, 41 Ill. App. 627; *Marmon v. Harwood*, 124 Ill. 104; *Patterson v. McKinney*, 97 Ill. 41; *Rutt v. Schuyler*, Admr., 49 Ill. App. 655; *Harting v. Jockers*, 136 Ill. 634.

While it is true that fraud can not be inferred, but must be proved, yet like all other facts it may be proved by circumstances. It very seldom can be proved by direct and

positive testimony. Circumstances, when proven, which convince the mind that the fraud charged has been perpetrated, are all that is necessary. Circumstances which merely raise a suspicion are not sufficient, but when they are so strong as to produce conviction of the truth of the charge, although there may remain some doubt, then it is proved. This is the extent of the rule that fraud must be proved. *Bullock v. Narrott*, 49 Ill. 62; *Bryant et al. v. Simoneau et al.*, 54 Ill. 324.

Plans and conspiracies to cheat and defraud are concocted in secret interviews. No one concerned while the existing relations are friendly will proclaim them from the house top, and great industry, patience and sagacity is required to expose them. Fraud loves deceit and stratagem, and its inexhaustible windings often can only be discovered, traced and exposed by circumstances. *Cowling v. Estis*, 15 Brad. 261; *Steere v. Haglund*, 50 Ill. 377; *Strauss et al. v. Kaner*, 56 Ill. 254.

It is a well settled rule of law that where a grantor in a deed of conveyance remains in possession of the property conveyed, and uses and treats the same as if he were the owner, his declaration and acts while so in possession, are competent evidence against the grantee therein upon a bill to set aside such deed as fraudulent. *Bump on Fraudulent Conveyances*, 569; *Jones et al. v. King et al.*, 86 Ill. 226; *Blackman et al. v. Preston Bros. et al.*, 123 Ill. 381; *Hook v. Mowre*, 17 Iowa, 195.

MR. JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

Appellee filed a bill in chancery seeking to set aside certain conveyances from Lewis E. Dillman to E. Corbin Dillman and from E. Corbin Dillman and wife to Maria E. Dillman out of the way of an execution issued on a certain judgment received in the Circuit Court of Will County by appellee against Lewis E. Dillman on the 27th of February, 1891, for \$6,638.

Upon a hearing the Circuit Court rendered a decree

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setting aside the conveyance upon the ground that they were fraudulent as against the rights of appellee. To reverse that decree appellant prosecutes this appeal and urges that the court had no jurisdiction to render the decree; that the bill does not sustain the decree; that there is a variance between the bill and the evidence; that the decree is against the evidence and that the proofs show that Maria E. Dillman is the legal holder of the property involved, free from any fraud.

The evidence shows that on the 2d of October, 1883, Lewis E. Dillman owned and occupied a homestead in Joliet, Illinois, the property in question, worth about \$9,000; that on that day he conveyed it for the consideration of \$10 to his son E. Corbin Dillman, who then conveyed to Maria E. Dillman, the wife of Lewis E. Dillman, for the same consideration. At that time Lewis E. Dillman was liable to appellee as guarantor upon two promissory notes for the sum of \$8,000 each, executed April 18, 1883, and upon which appellee recovered judgment against appellant on February 27, 1891. The suit which resulted in such judgment was commenced in January, 1888, and in May, 1888, an attachment in aid was sued out and levied upon the property in question. Appellee recovered judgment *in personam* and in attachment, and on the following day sued out an execution, special and general, and placed the same in the hands of the sheriff. This execution was in the hands of the sheriff when the bill was filed, March 21, 1891.

It is contended by counsel for appellant that the bill is a creditor's bill, and that to maintain a bill of that character it is necessary to aver and prove the issue and return of an execution unsatisfied. Until that has been done he insists the complainant's remedy at law has not been exhausted and he has no standing in a court of equity. Where a creditor simply seeks to obtain satisfaction of his judgment out of some equitable estate of the judgment debtor which is not liable to levy and sale under an execution at law, he must exhaust his remedy at law by obtaining judgment and having an execution issue and returned *nulla bona* before

he is entitled to relief from a court of equity; but if he seeks to remove a fraudulent conveyance out of the way of his execution he may file his bill as soon as he obtains judgment. *Weightman v. Hatch*, 17 Ill. 286; *Newman v. Willetts*, 52 Ill. 98; *Wisconsin Granite Company v. Gerrity et al.*, 144 Ill. 77.

It is further insisted that the bill does not sustain the decree for the reason that it alleges actual fraud on the part of Dillman in making the transfer; seeks relief entirely upon the ground of actual fraud, and contains no sufficient averments on which to base a finding of fraud at law, while the proofs show that no actual fraud was intended and in any view can not be regarded as going further than establishing that the transfer is a voluntary settlement upon Dillman's wife. We are disposed to regard this contention as rather "fine spun."

The allegations of the bill are in substance that, on the 2d of October, 1883, appellee was a creditor of appellant; that on that day appellant conveyed his property to his wife without consideration; that appellee has recovered judgment upon his claims; that he is prevented from selling the property under an execution because of such conveyance; that appellant is insolvent and has no other property out of which the judgment could be made; that the conveyance is a mere sham and that Maria E. Dillman holds the property in trust for appellant. We think these allegations are sufficient to support the decree. If proven, the law presumes the conveyances were fraudulent and void as to existing creditors. More was really averred in the bill than was necessary. A voluntary conveyance, made when the grantor is indebted, is presumptive evidence of fraud; and a fraudulent intent will be presumed, from the fact that the party conveying was indebted at the time, and that as to pre-existing creditors every conveyance not made on a consideration valuable in law, is void. *Montz v. Hoffman et al.*, 35 Ill. 553; *Harting v. Jockers et al.*, 136 Ill. 627.

It is claimed that the conveyance was not voluntary, but was made in consideration of money advanced by the wife

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to Dillman from time to time before then. The advances attempted to be set up amounted to about \$2,000, and were made so long before the date of the deed as to be barred by the statute of limitations. We entertain no doubt that the conveyance was voluntary.

At the time of the conveyance Dillman retained shares in two corporations which, it is claimed, were sufficient to enable him to meet all his obligations in the usual course of business.

These shares were of an uncertain value. One corporation has never paid anything and the other soon failed, its stock becoming worthless. All the property retained by Dillman was of a speculative character and eventually became worthless. It does not appear that it had ever a marketable value.

A careful consideration of the evidence satisfies us that the bill is fully sustained by the proof, and that the decree of the Circuit Court should be affirmed.

Frederick Stein v. George W. Blake.

1. **VERDICT—Upon Conflicting Evidence.**—Where the evidence is conflicting, it is entirely a matter for the jury to determine where the truth is, and having done so by their verdict, this court will not ordinarily interfere.

2. **HUSBAND AND WIFE—Liability for Legal Services Rendered the Wife.**—In the absence of an agreement, the husband is not liable for legal services rendered the wife in a suit against him for separate maintenance.

3. **SAME—The Wife's Right to Protection Pending Suit Between.**—The wife is entitled to protection against the wrongs of all persons, including the husband, and the necessary means to enforce such remedies as the law provides; and where the husband violates the law, and his obligations toward his wife, the law will compel him to afford her the facilities for vindicating her rights in a court of justice.

4. **SAME—Agreement to Pay the Wife's Solicitor.**—It is within the power of the husband to refuse to pay his wife's solicitor in her suit against him for divorce or separate maintenance, before action of the court on the matter, and compel the solicitor to resort to the power

of the court for relief; but this right may be waived, and the husband may bind himself to pay the solicitor either a stipulated sum or a reasonable amount for his services in the suit.

5. *SAME—Wife's Solicitor's Fees Not Necessaries.*—Solicitor's fees for services rendered the wife, in a suit against her husband for separate maintenance, can not be regarded as falling within the well recognized list of articles known as necessaries.

6. *SAME—Wife's Solicitor's Fees—Statute of Frauds.*—An agreement by the husband to pay the wife's solicitor's fees for services rendered in a suit against him for separate maintenance is not an agreement within the provisions of section 1, chapter 59, R. S., entitled "Frauds and Perjuries," providing that no action shall be brought to charge any person upon a promise to answer the debt of another person, unless the promise is in writing and signed by the party to be charged.

7. *EVIDENCE—Of Wife's Condition Pending a Suit for Separate Maintenance.*—In an action against a husband upon his special promise to pay his wife's solicitor's fees for services rendered in an action against him for separate maintenance, evidence tending to show the poverty and needy circumstances of the wife before and at the time of filing the bill, and the husband's refusal to support her, is properly admissible as tending to show a condition of things that would render it obligatory upon the husband to furnish support for his wife, as well as to pay her solicitor's fees, in obtaining it, and to show that the bill was properly filed.

Memorandum.—Assumpsit for legal services. In the Circuit Court of La Salle County, on appeal from a justice of the peace; the Hon. DORRANCE DIBELL, Judge, presiding; trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 13, 1894.

APPELLANT'S BRIEF, FOWLER BROS., ATTORNEYS.

Appellant contended that the promise relied upon was within the statute of frauds, and in support of his position cited *Blank v. Dreher*, 25 Ill. 331; *Williams v. Corbett*, 28 Ill. 263; *Chapin v. Laphan*, 20 Pick. (Mass.) 467; *Tilletton v. Nettleton*, 6 Pick. (Mass.) 467; *Loomis v. Newhall*, 15 Pick. (Mass.) 159; *Nelson v. Boynton*, 3 Met. (Mass.) 396; *Jackson v. Raynor*, 12 Johns. (N. Y.) 291; *Birchell v. Neosten*, 36 Ohio St. 331.

Where the original debt still subsists, and where the plaintiff has relinquished no interest, or advantage has insured to the benefit of the defendant, it is not an original contract to pay another's debt and must be in writing. *Curtiss v. Brown*, 5 Cush. (Mass.) 491; *Scott v. Thomas*, 1

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Scam. 58; Denton v. Jackson, 106 Ill. 433; Hite v. Wells, 17 Ill. 88; Chilcote v. Kile, 47 Ill. 88; Durant v. Rogers, 71 Ill. 121; Owen v. Stephens, 78 Ill. 463; Hardman v. Bradley, 85 Ill. 162; Power v. Rankin, 114 Ill. 52.

The statute of frauds is presumed to have been pleaded before a justice of the peace. Comstock v. Ward, 22 Ill. 248; Williams v. Corbett, 28 Ill. 262.

APPELLEE'S BRIEF, GEO. W. W. BLAKE AND TRAINOR AND
BURKE, ATTORNEYS.

Appellee contended that Mr. Blake, as solicitor for Mrs. Stein, had a legal method to compel Stein to pay his solicitor's fees, and it is to be presumed Stein knew this; at any rate, Stein's agreement, when he promised to pay his fees out of court, and without being ordered to do so, provided Mr. Blake would wait on him for a time, is such a settlement of a supposed legal liability, at least, as can be enforced in law. Bunting v. Darbyshire, 75 Ill. 408.

To settle or avoid litigation is an object of value. So that if one to whom another is in good faith pressing or suing makes a promise on the strength of which the suit is foreborne or withdrawn, he can be compelled to fulfill it; though it should be afterward shown, or the promisor knew, at the time, that the demand was not well founded in law or in fact. Parker v. Enslow, 102 Ill. 272; Bishop on Contracts, Sec. 57.

And in general terms, the compromise, fairly obtained, of a right at the time doubtful, constitutes a valuable consideration, whatever a subsequent enlightenment may reveal concerning its validity. 79 Ill. 318; 81 Ill. 172; 70 Ill. 96; 9th Brad. 103; 4th Brad. 203.

The value consists in the release from an uncertain position with its anxieties from apparent danger and from inevitable expense and trouble. Bishop on Contracts, Sec. 57.

MR. PRESIDING JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

The appellee brought suit before a justice of the peace

against appellant to recover for legal services rendered by him for Theodocia Stein, wife of appellant, in filing a bill by her against appellant, her husband, for separate maintenance. The cause was taken by appeal to the Circuit Court and was tried by a jury and resulted in a verdict for appellee for \$75, upon which the court rendered judgment. From this judgment this appeal is taken. The suit for separate maintenance was compromised by and between appellant and his wife, and was dismissed on written stipulation signed by each. The right of appellee to recover was based on an alleged agreement between appellant and appellee, entered into between them about ten days or a week before the dismissal of the suit for separate maintenance. There was a motion made, or proposed to be made, by Mrs. Stein, for alimony before the supposed agreement, but no petition sworn to by complainant had been filed.

The appellee testified on trial that in an interview between him and appellant, the latter promised him that if he would allow the matter (of the suit) to run a few days or a week, that he would see Mrs. Stein and fix the matter up with her and pay appellee's fees. Appellee further testified that appellant promised, if he would wait, and not force the order for alimony and solicitor's fees for eight or ten days, he would pay him his fees, and would fix her all right. Appellee further testified that he waited the agreed length of time, and the appellant did not pay him but procured a stipulation from his client without his knowledge, and had the case dismissed, and then refused to pay him his fees. The value of appellee's fees was then proven to be from \$100 to \$200, and there was no rebutting evidence in relation thereto.

It is true appellant denied this alleged agreement in every particular. The issue as to the promise rested upon their testimony alone.

It is complained that the verdict was against the weight of the evidence and should be reversed for that reason. We are unable to see that such is the case. It was entirely a matter for the jury to determine which one of the parties it

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would believe, and having exercised that right, and having found for appellee, we do not feel authorized to disturb it on that issue for want of evidence to support it. The appellant also relies on the statute of fraud and perjuries, and asked the court to instruct the jury to find for appellant on the issue as presented, and moved to exclude the evidence from the jury, and the court refused to do either.

The appellant claims that the husband, in cases of this character, can not be made responsible to pay the wife's solicitor's fees after the suit is ended, and cites *McCulloch v. Murphy*, 45 Ill. 256; *Dow v. Eyster*, 79 Ill. 254; *Newman v. Newman*, 69 Ill. 167. In the absence of an agreement there can be no doubt but that such is the law. In this case, however, the jury found by its verdict that appellant promised to pay appellee his reasonable fees rendered for his wife. In cases for divorce and in cases for separate maintenance, which are the same in principle, while the suit is pending and being litigated, the "wife will be presumed to be entitled to support." The wife is entitled to protection against the wrongs of all persons, including the husband, and the necessary means to enforce such remedies as the law provides, "and where the husband violates the law and his sacred obligations toward his wife, it is her right that he should afford her facilities for vindicating her rights in a court of justice." *Newman v. Newman, supra*. It would, undoubtedly, be within the power of the husband to refuse to pay his wife's solicitor in a suit in her favor against himself for divorce, or separate maintenance, before action of the court on the matter, and compel the solicitor to resort to the power of the court for relief, but we think that right may be waived by the husband, and he may bind himself by an agreement to pay the attorney, either a stipulated sum or a reasonable sum, for his services in the suit; and such a claim is an enforceable right, and is a moral as well as a legal obligation resting upon him, and it seems no more than reasonable that he may acknowledge it and waive the enforcement of the remedy in the case itself which his wife has against him. And relying on the promise to pay, the solicitor agreed to delay in

behalf of the wife the prosecution of the suit, and did delay it, so that the husband might compromise with his wife and settle the dispute. This was an additional consideration for the promise. While there are authorities to the contrary, an action at law can not be maintained in this State by a solicitor against a husband, who may prosecute or defend an action for divorce for his wife. *Dow v. Eyster*, 79 Ill. 254. Such claim for solicitor's fees "can not be regarded as falling within the well recognized list of articles known as necessities." *Ibid*.

But services rendered by an attorney for the wife in defending her against a charge of murder was held to be necessities and recoverable against the husband. *Roberts v. Artz*, 38 App. 593. But while such services are not necessities there is a recognized obligation for the husband to pay them for the protection of his wife against his own wrongful acts while a suit for separate maintenance is pending, but this obligation must be enforced by the court unless such enforcement is waived by the husband, and he agrees to pay for such services without an order of court for payment. He should be supposed to know whether he is liable and need not put the attorney to the unnecessary expense of filing a petition and prosecuting him for an order or decree for the same, which would necessarily include the additional costs of obtaining it. The waiver of such application for alimony would be a direct benefit to the husband in the saving of the expense of increased litigation.

The appellant insists that the case comes within Sec. 1, Chap. 59, R. S., entitled "Frauds and Perjuries," wherein it is provided that "no action shall be brought whereby to charge, etc., etc., any defendant upon any special promise to answer for the debt, default or miscarriage of another person," * * * "unless the promise or agreement on which the action is brought shall be in writing, signed by the party charged therewith," etc. It is insisted by appellant's counsel that this case falls within the terms of the above statute for the reason the wife is an "other person," and that appellee having given credit to her, and she being

liable for his fees in the suit for separate maintenance, he can not hold appellant liable on his promise unless it was in writing. We do not think this point can be sustained.

As we have above shown, the husband is liable for solicitor's fees in an action like the one concerning which the supposed promise was made to appellee to pay his solicitor's fees, if only the court had been applied to for an order for allowance therefor. The appellee when commencing the suit may be supposed to have relied on his rights to enforce such payment from appellant by order of court, as well as on the wife, for his fees in prosecuting the case. Therefore appellant, in promising to pay appellee his solicitor's fees, recognized his obligation or liability, and assumed the payment of his own, and not an "other person's" debt or liability. The case, then, does not come within the statute. It is claimed that the statute only allows the solicitor's fees in such cases to be paid to the wife and not the attorney; therefore the attorney could not be the promisee. While this may be so in a sense, yet the court may order it paid for the benefit of her solicitor, and even order it paid to him, especially after the services have been rendered, as they had been in the suit for separate maintenance against appellant when the promise was made. It is analogous to a suit against a husband by one furnishing necessities to his wife. The debt is due to the one furnishing the necessities although and because the husband owes his wife a support according to her station in life. The services of appellee had been advanced to appellant's wife, and the former was the party to whom the debt at the time of promise was really due.

The instructions were proper; they were given on the hypothesis of appellant's liability on his promise to pay appellee, and as we view the law, were correct, and those refused were properly so refused, as they were offered on appellant's theory of non-liability on the promise to pay appellee solicitor's fees, and as we have seen, were erroneous, and were properly refused.

There was some evidence introduced on the part of ap-

pellee, tending to show the poverty and needy circumstances of appellant's wife before and at the time of filing the bill for separate maintenance, and also tending to show appellant's refusal to support her, to which objections were made at the time, and the admission of which by the court in evidence is claimed here as error. We think it not entirely improper to admit proper evidence on these points as tending to show a condition of things that would render it obligatory on appellant to furnish support for his wife as well as to pay her solicitor's fees in obtaining this support and to show that the bill was properly filed.

There are some parts of the evidence that it would have been proper to exclude, but these were not specifically pointed out to the court, but the evidence objected to as a whole. But even if admitted improperly we think it would not be reversible error.

Seeing no serious error in the record the judgment of the court below is affirmed.

56	532
61	420
56	532
176	885

Christian Hacker, John Walz, John O. Barrett, William G. Wilcox and Fred C. Wilcox v. R. Munroe & Son.

1. **FRAUDULENT SALES—*Purchases on Credit Not Fraudulent Because the Buyer is Insolvent.***—There is no law requiring a person when purchasing goods to give notice of his inability to pay for them, on penalty of having the sale held voidable for a failure to do so. A purchase on credit is not fraudulent merely because the buyer is embarrassed and unable to pay.

2. **REFLEVIN—*Does Not Lie for Fixtures.***—Replevin does not lie for the recovery of things annexed to real estate so as to become a part of it, as fixtures.

3. **SAME—*Burden of Proof.***—In a replevin suit where the right of property is in issue the burden of proof is upon the plaintiff to show his right to the possession of the property, or fail in his action; he must recover, if at all, upon the strength of it, and if he has parted with his ownership for the obligation of another without fraud, it is a matter of no concern that the defendants in the suit paid nothing for the property.

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4. **FIXTURES—Character of Property Not Changed, When.**—The fact that before commencing a suit in replevin for certain articles of personal property, the plaintiff filed a claim for a mechanic's lien on the real estate upon which the articles (claimed to be fixtures) were situated, which was not followed up by a suit to enforce it, does not change the character of the property or affect the right to maintain the action of replevin.

Memorandum.—Replevin. In the Circuit Court of Will County; the Hon. DORRANCE DIBELL, Judge, presiding. The pleadings are stated in the opinion of the court; trial by jury; verdict and judgment for plaintiffs; appeal by defendants. Heard in this court at the May term, 1894. Reversed and remanded. Opinion filed December 18, 1894.

APPELLANTS' BRIEF, HILL, HAVEN & HILL AND GEO. S. HOUSE, ATTORNEYS FOR APPELLANTS.

If a buyer purchase goods with the preconceived design not to pay for them, or with the intention at the time of such purchase never to pay for them, the purchase is fraudulent, but there must be a positive and predetermined intention entertained and acted upon by the buyer at the time of such purchase never to pay for the goods. 1 Benj. on Sales (6th Am. Ed.), Secs. 655, 656, note 18; Farwell v. Hanchett, 120 Ill. 573; Henshaw v. Bryant, 4 Scam. 97; Catlin v. Warren, 16 Brad. 418; Lewis v. Reticker, 27 Ill. App. 601; Armstrong v. Lewis, 38 Ill. App. 164.

In order to set aside a sale of goods for fraud in the purchaser, such a case must be made out as would authorize a jury to convict the purchaser of obtaining the goods under false pretenses. In such a case the *quo animo* with which purchases are made, whether the purchaser expected or intended to pay for the goods when he purchased them, or intended to cheat the seller out of them, is the very gist of the fraud. Henshaw v. Bryant, 4 Scam. 97.

A mortgagee or pledgee of personal property from the fraudulent vendee thereof without notice, and even a purchaser from such buyer, in consideration of a pre-existing debt, and others in like situation, are regarded as *bona fide* purchasers and protected as such. Butters v. Haughwout, 42 Ill. 18; M. C. R. R. Co. v. Phillips, 60 Ill. 190; Kranert v. Simmon, 65 Ill. 34.

It is not necessary that a chattel should be physically attached to the real estate to become a part thereof. Rails belonging to a fence or hauled onto the premises with the intention of erecting a fence, or timber for a building, although not erected, but lying loose around the land, boilers, engines, presses and paper cutters of a printing office, and rails, ties, chains and spikes brought upon the ground of a railroad company and designed to be attached, but in no wise attached thereto, constitute a part of the real estate. *Palmer v. Forbes*, 23 Ill. 304; *McLaughlin v. Johnson*, 46 Ill. 163; *Arnold v. Crowder*, 81 Ill. 56; *Jenny v. Jackson*, 6 Brad. 32; *Oatis v. May*, 30 Ill. App. 581; *Calumet I. & S. Co. v. Lathrop*, 36 Ill. 249.

The clear tendency of modern authority is to give pre-eminence to the question of intention, but it is to be noted that the intention is to be sought, not in the undisclosed or secret purpose of the actor, but as manifested in his acts considered in connection with the surrounding circumstances. *Calumet I. & S. Co. v. Lathrop*, 36 Ill. 249; *Fifield v. Farmers National Bank*, 47 Ill. App. 118; 35 N. E. R. 803; *Arnold v. Crowder*, 81 Ill. 56; *Sword v. Law*, 122 Ill. 496.

APPELLEES' BRIEF, J. W. D'ARCY AND E. MEERS, ATTORNEYS.

Misrepresentations knowingly made are sufficient to warrant an inference of fraudulent intent. *Staver & Abbott Mfg. Co. v. Coe*, 49 Ill. App. 426; *Wachsmuth v. Martine*, 45 Ill. App. 244.

If the party, at the time of making the fraudulent representations, has everybody in mind to whom the representations may come, that includes the particular person to whom the representations do in fact come. And the person defrauded is as much within the scope of the fraudulent party's intent as if the representations were made to him direct. *Commonwealth v. Call*, 21 Pick. (Mass.) 515; *Genessee Co. Savings Bank v. Michigan Barge Co.*, 52 Mich. 164; *Wells v. Cook*, 88 Am. Dec. 442.

All erections made for the purpose of trade during the

tenancy, such as soap vats, fire engines to work a colliery, pans used in manufacturing salt, brew-houses, furnaces and coppers, green-houses, hot-houses erected by nurserymen and gardeners, may be moved by the tenant. *Potts Case*, Salk., 368; *Lawton v. Lawton*, 3 Atk. 13; *Lord Dudley v. Lord Warde*, Ambler, 113; *Lawton's Exrs. v. Salmon*, 1 H. Blk. 259 and notes; *Miller v. Plumb*, 6 Cowan 665; *White v. Arnt*, 1 Wharton 91; *Guffield v. Hapgood*, 17 Pick. (Mass.) 301; *Van Ness v. Packard*, 2 Pet. (U.S.) 413.

If a debtor use his personal property upon the real estate of another, with the knowledge and consent of the owner, so that it becomes a part of such realty, for the purpose of defrauding his creditors, and prevent them from obtaining satisfaction of their demands, they may still follow the property into the hands of the owner of the premises thus benefited and fasten their claims upon such premises to the extent of the debtor's property thus appropriated. *Bump on Fraudulent Conveyances*, 239, note 1; *Lyman v. McGregor*, 38 Allen (Mass.) 182; *Deitz v. Atwood*, 19 Ill. App. 96.

To determine the immovable character of a fixture, these tests are, by the modern authorities, applied, viz.: First, actual annexation to the realty or something appurtenant thereto; second, application to the use or purpose to which that part of the realty with which it is connected is appropriated, and third, the intention of the parties making the annexation to make a permanent accession to the freehold. *Herman on Chattel Mortgages*, 6; *Ewell on Fixtures*, 21, 22; *Tyler on Fixtures*, 114; *Washburn on Real Property*, 16. *Washburn* (page 8) lays down the rule: "It may be stated in the first place, that whether a thing which may become a fixture becomes a part of the real estate by annexing it, depends as a general proposition upon the intention with which it was done." In *Kelly v. Austin*, 46 Ill. 156, this court said: "While the intention alone will not always determine whether such structures as were then being considered are or are not to be considered as realty, it will have a controlling influence in cases of doubt." *Dooley v. Christ*, 25 Ill. 551; *Smith v. Moore*, 26 Ill. 392; *Arnold v. Crowder*, 81 Ill. 56; *Thielman v. Carr et al.*, 75 Ill. 385.

MR. JUSTICE CARTWRIGHT DELIVERED THE OPINION OF THE COURT.

This is a suit in replevin begun by appellees against appellants for the possession of three boilers and the plates, smoke stacks, valves and attachments belonging thereto. The pleas were *non cepit, non detinet*, property in defendants, and that the boilers, etc., were fixtures belonging to real estate and buildings owned by defendants designed for a tin plate mill and plant, and therefore not the subject of replevin. To the plea of property in defendants the plaintiffs replied that the property replevied was the property of plaintiffs and not of defendants, and by replication denied that the property replevied was fixtures. A count in trover was filed by leave of court for articles not found under the writ, and to that count a plea of not guilty was interposed. There was a trial and the verdict was for plaintiffs as to all the property except the plates, bolts, rods, nuts and irons physically attached to the real estate, and for defendants as to the parts so physically attached, and defendants were found guilty as to the articles described in the count in trover, and plaintiffs' damages under that count were assessed at \$80. The court required a remittitur of \$44 from the damages in trover and entered judgment in accordance with the verdict except as to the amount of damages, the judgment being for \$36 damages as reduced by the remittitur.

In order to make the requisite proof of title in themselves the plaintiffs introduced evidence that they made the boilers and attachments at their factory in Pennsylvania, and sold and delivered them to the Lewis Steel, Sheet and Tin Plate Company, about fourteen months before commencement of this suit. By the contract the boilers and fixtures were to be delivered on board the cars at Pittsburg, Pa., on October 20, 1891, and they were so delivered October 26, 1891, and shipped to said Lewis Steel, Sheet & Tin Plate Company, a corporation at Joliet, Illinois. Plaintiffs claimed that the sale was voidable at their election because of fraudulent representations on the part of the purchaser showing fraudulent intent, and that they exercised their right to avoid

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the sale and reclaim the possession by serving a notice on the corporation August 19, 1892, about ten months after the sale; that they thereby rescinded said sale for such cause, and demanded an immediate return of the property. The only representation of any kind on behalf of the Tin Plate Company proved, was made by J. Davis Lewis, who was then president of the corporation, to one of plaintiffs' firm. Plaintiffs had made a written proposition to the corporation to furnish the boilers and fixtures, and on August 20, 1891, at the office of Lewis Brothers, in Pittsburg, Pa., the proposition was accepted by said president. Robert Munroe, one of the firm who received the acceptance, then stated that there was nothing in the contract about payments, and J. Davis Lewis, the president, then said that they had more than \$25,000 in the bank at Joliet, but they were paying for their other machinery, and it was more than likely they would be a little short when they came to start up, and would need some money to operate the plant, and that if satisfactory they would pay part cash and the balance in four months. It was then agreed that the terms should be \$1,261 cash on shipment and a note for \$1,700 on four months time. It was something over two months after that time that the boilers were completed and shipped, and before shipment plaintiffs obtained a report of the financial standing of the corporation from the Bradstreet Company, but that report was not admitted in evidence and could have no influence in the case. The Tin Plate Company was not in any way responsible for its statements.

The court overruled, for the time being, objections to the statement of the amount of paid up capital, amounts of stock issued and stock in treasury made to the Bradstreet Co., July 1, 1891, and to what was said to an agent of that company the last of September or first of October, 1891, as to the amount of their cash and other property, upon the promise of counsel to show that such information was communicated to plaintiffs. No evidence of the promised kind was offered, and the court afterward ruled that the evidence might stand merely as evidence tending to prove their finan-

cial condition, and instructed the jury to disregard both the written statement and what was said to the agent in considering the question of fraudulent representations and of fraud in making the contract. As evidence, for the purpose for which they were allowed to stand, they tended to overthrow plaintiffs' claim. The claim that fraudulent representations were made was thereby left with no proof of any representation, except that in August, 1891, the corporation had over \$25,000 in bank in Joliet, and yet the argument for appellees in this court that the verdict was right, is based largely upon the reliance of plaintiffs upon the excluded report from the Bradstreet Co., and the claim that the statements to that agency and Bradstreet's agent were untrue. Manifestly, argument founded on excluded evidence can have no weight, and what plaintiffs learned from the Bradstreet agency was excluded as already pointed out. If the corporation did not have \$25,000 in bank in Joliet at the time stated, that fact could have been easily proved, but no evidence of that sort was offered. Its bills were not being promptly paid at that time, but it was engaged in a great enterprise involving large expenditures. It built a very large iron mill, put in railroad tracks, dug an artesian well and put in foundations for engines, etc. What was said did not purport to be a statement of net worth, and was coupled with the statement that they would probably be short of funds. The evidence fell far short of proving false and fraudulent representations. Nor do we find any evidence of an intent on the part of the purchaser in buying the property not to pay for it. Afterward, when there was a proposition, to which the former as well as present owners were parties, to have a Welshman named Jenkins take the plant, he was to pay certain enumerated debts, among which was the debt to plaintiffs.

When the boilers were received the last of October, the corporation was out of funds and unable to pay the freight, but the delivery was made without the cash payment, and no action of any kind was taken by plaintiffs for several months afterward. There is no rule of law that required the corporation to give notice of its inability to pay, on

penalty of having the sale held voidable for a failure to do so, and a purchase on credit is not fraudulent merely because the buyer is embarrassed and unable to pay. *Henshaw v. Bryant*, 4 Scam. 97; *Blow v. Gage*, 44 Ill. 208; *Kitson v. Farwell*, 132 Ill. 327; *Morrill v. Corbin*, 13 Ill. App. 81.

The tin plate mill and plant was being built in pursuance of a contract between the Lewis Brothers, consisting of D. Trevor Lewis, J. Davis Lewis and Nathaniel D. Lewis, who had recently come from Wales and desired to start such an enterprise, and a syndicate at Joliet interested in a tract of land of about 100 acres, by which the Lewis Brothers were to bring to Joliet a corporation with a capital stock of \$500,000, and erect on that tract mills for the manufacture of tin plate, etc., and were to employ two hundred persons, with a pay roll of not less than \$600 per day, and the syndicate were to deed a block of land for a site, and pay a bonus of \$20,000 as the construction of the mills progressed. When the boilers and attachments arrived Thomas M. Creevy, one of the syndicate, paid the freight, and they were unloaded and placed over foundations where they were intended to be finally located. The defendants proved title to the tract of land through a contract of purchase with James C. Zarley, the owner, one of the syndicate, antedating the contract with Lewis Brothers, and enforced by a decree for specific performance, and also by quit-claim deed from Mary Lewis and her husband, J. D. Lewis, one of the Lewis Brothers, of the site of the plant and other parts of the tract conveyed to said Mary Lewis in pursuance of arrangements with the syndicate. Defendants took possession of all the property at the date of the deed from Mary Lewis and husband September 24, 1892, and remained in possession until December 21, 1892, when plaintiffs demanded possession of the property replevied and began this suit. Defendants claimed that the property replevied was part of the real estate as fixtures, and the verdict and judgment gave them such parts as were physically attached to the real estate and foundations, and gave plaintiffs all that were not so attached.

In March, 1892, the plaintiffs filed a claim for a lien upon the real estate on which the boilers were located, treating them as part of the real estate, and on the day previous to the commencement of this suit they filed a release of that claim. After the defendants got possession they proceeded toward the completion of the plant as a tin plate mill, but after two or three months abandoned all preparations on account, as they say, of a change in the national administration. The foundations for the boilers were near the large mill, and after the boilers were located a building was put up over them to protect them. They were supported by blocks and were never lowered to their permanent resting places. Considering all the evidence as to the situation of the property and affecting the question of intention, we would not be disposed to interfere with the finding of the jury that those things not annexed to the real estate had not become a part of it. Nor do we think that the filing of the claim for lien, which was not followed by any suit to enforce it, changed the character of the property.

When the defendants contracted for the land there was no tin plate mill on it, and there was no intention to build one. They paid the contract price but nothing additional for the mill or any of the property replevied which they obtained when they took possession, and it is said that there is no equity in their claim. If it was permissible upon that ground, doubtless it would seem more equitable that plaintiffs should take this property from defendants, who paid nothing for it, and thereby save themselves from the loss resulting from giving credit, than that the defendants should have it, but that can be said in every case where a purchaser fails to pay for property. The burden of proof was on plaintiffs to show their title and right of possession or fail in their action. They must recover, if at all, on the strength of their own title, and if they had parted with their ownership for the obligation of the Tin Plate Co. without fraud, it was a matter of no concern in this suit that the defendants paid nothing for the boilers. *Anderson v. Talcott*, 1 Gilman 365; *Chandler v. Lincoln*, 52 Ill. 74; *Constantine v. Foster*, 57 Ill. 36; *Reynolds v. McCormick*, 62 Ill. 412.

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It is a misfortune that plaintiffs were unable to collect from the Tin Plate Co., but such losses can not be retrieved by declaring the sale void and getting the property back, unless legal ground for doing so can be shown. The notice of plaintiffs that they rescinded the sale was served on J. D. Lewis, August 19, 1892, and he signed an acknowledgment of the service as late president of the company. Plaintiffs were permitted to prove by a witness that he saw J. D. Lewis about a week before the trial of this case, and Lewis said that plaintiffs' attorney served notice on him, and he relinquished any claim he had on the boilers to the attorney. J. D. Lewis had once been president of the Tin Plate Co., but so far as appears, he was not at the time the notice was served, as he acknowledged the service as late president, nor at the time of the statement to the witness. There is no evidence that he did or said anything in the way of relinquishment when the notice was served, or that he had any authority to do so. The evidence was improperly admitted.

We think the evidence insufficient to sustain the charges of fraud in the purchase of the property which would render the sale voidable, and the judgment will, therefore, be reversed and the cause remanded.

MR. PRESIDING JUSTICE LACEY DISSENTS.

I can not concur with the reversal of the judgment in this case. It seems to me wholly inequitable to do so. The boilers were not the property of the appellants, and the only claim they had in them was a naked possession. The appellee had shipped them to the Tin Plate Company on the representations of its agent they would be paid for and that the company was able to do so. When the boilers arrived at Joliet the Tin Plate Company was so utterly insolvent that it could not pay the freight on them. I think, under the evidence and circumstances, the jury were justified in their verdict and in believing that the boilers were purchased with a fraudulent intent or in so reckless a manner as to ability to pay for them, the jury might infer fraudulent intent at the time of purchase, not to pay for them.

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Illinois Central Railroad Company v. Cornelius Reardon, Administrator of the Estate of Frank Reardon.

1. **RAILROAD COMPANIES—Negligence in Loading Timbers.**—It is negligence in a railroad company to load timbers upon flat cars without providing some means to prevent them from shifting about and over the end of the car.

2. **ORDINARY CARE—Age of Injured Person to be Considered.**—In determining whether a person was at the time of an injury received, so negligent of his own safety as to preclude a recovery, his age should be taken into consideration.

3. **MINORS—Employers of—Duty to Instruct.**—Where a minor is employed in an extra hazardous line of work it is the duty of the employer to see that he is properly instructed as to the perils of his position and guard him against the dangers incident thereto.

4. **WITNESSES—Administrator as Plaintiff, Competent.**—Where an administrator of a deceased person sues for damages occasioned by his death, he is a competent witness. The prohibition of the statute is against the party adverse to the administrator, not against the administrator.

Memorandum.—Action for damages. Death caused by negligence. In the Circuit Court of Jo Daviess County; the Hon. JAMES SHAW, Judge, presiding. Declaration in case; plea, not guilty; trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1894, and affirmed. Opinion filed December 13, 1894.

R. H. McCLELLAN, attorney for appellant.

D. & T. J. and J. M. SHEEAN, attorneys for appellee.

MR. JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This suit was brought by appellee, as administrator, to recover damages for the death of Frank Reardon, who was killed on the 15th of August, 1892, while coupling cars in appellant's yards at Freeport, Ill. There was a recovery for \$2,300.

The switch yard, where the accident occurred, consists of several tracks built on a side hill and grade of over

twenty feet to the mile, so that unsecured cars in running from one end to the other of the yard would, from their own weight, attain considerable speed. Prior to the 13th of August, 1892, two engines and two crews attended to the switching in the yards. Each crew consisted of a foreman and two helpers. On the evening of the day mentioned, the foreman of each engine refused to go out with his engine because the crews had been reduced so as to give to each but one helper instead of two. Wm. J. Reardon, a brother of deceased, and one of the helpers, joined in the refusal. He and his foreman were thereupon discharged by the general yard master. The foreman of the other engine was then given a full crew. To make up his crew the deceased, Frank Reardon, then barely nineteen years of age, was employed as a helper. He worked that night, the night following, and while in the performance of his duties on the third night met with the accident that caused his death.

On the morning of the day on which the deceased was killed there came into the Freeport yards a car load of assorted timbers. The timbers were company material and were loaded on a coal car without means of preventing the timbers from shifting. The load had shifted over one end of the car onto the caboose to which it was attached and was detained in the yards for reloading. During the day the car was reloaded and turned back into service. No means were used to prevent the timbers from again shifting, however. In handling the car that evening the timbers again shifted and extended over the end of the car, making the operation of coupling onto another car extremely dangerous. While the car was in this condition standing still upon the track deceased attempted to couple it onto some cars which were kicked up against it. He was on the cars being kicked up the track and when approaching the other car he jumped off and ran in to make the coupling. He was caught by the projecting timbers and killed.

We think the dangerous condition in which the timbers were on the car furnished sufficient proof of negligence to

make appellant liable. The car inspector knew that the car was put out for the reason that it was unsafe to haul it and to enable it to be reloaded. When reloaded, some means should have been adopted to prevent the lumber from shifting.

It is insisted, however, that the deceased was himself guilty of such negligence as to preclude a recovery; that when the accident happened it was broad daylight; that the dangerous condition of the car was clearly apparent, and that to rush in ahead of the moving cars was, under the circumstances, the height of recklessness.

In determining whether the deceased was at the time so negligent of his own safety as to preclude a recovery his age should be taken into consideration. A boy barely nineteen years of age would not be expected to exercise that precaution usually exercised by one of mature years. Where a minor is employed in an extra hazardous line of work it is the duty of the employer to see that the minor is properly instructed as to the perils of his position and guard him against the dangers incident thereto. *Hinckley v. Horazdowsky*, 133 Ill. 359; *Brick Co. v. Reinneiger*, 140 Ill. 334.

It is claimed, however, that appellee is estopped from invoking the aid of that rule of law because the deceased long before the day of the accident sought employment of appellant and represented that he was about the age of twenty-one years. He then worked several weeks as a brakeman. It does not appear that he made any representations when employed on the 13th of August, 1892, as a helper in the switching crew. Although there is some conflict in the evidence upon this point, it sufficiently appears from the proof that the yard master, within a very short time after the employment of deceased, and on the same evening, was notified by the brother of deceased that he was a minor. But independent of the question of deceased's age, we do not think we would be warranted in setting aside the finding upon the ground that he was guilty of such contributory negligence as to preclude a right of recovery. He was going

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toward the car rapidly and without good opportunity to see that the timber projected so far over as to prevent his making the coupling in a standing position, and under the circumstances was compelled to act in great haste.

It is contended that appellee, being the administrator, was not a competent witness and that the refusal of the court to sustain an objection to his testimony is reversible error. The prohibition of the statute is against the party adverse to the administrator, executor, heir or devisee of a deceased person, not against the administrator, executor, heir or devisee.

We see no substantial objection to the instructions given to the jury, nor to the action of the court in refusing instructions asked.

We do not think the amount of damages awarded are excessive. Judgment affirmed.

James M. Condit v. Robert Dady.

1. **CONTRACTS**—*What Will Justify a Court in Rescinding.*—To justify a court in rescinding a contract executed by two parties upon the ground that it was procured by fraud, the testimony must be of the strongest and most cogent character, and the case a clear one.

2. **DELIVERY**—*Placing an Instrument in the Hands of a Third Party.*—Upon the subject of the delivery of a written contract or deed, the authorities are abundant that whatever physical disposition of the instrument may have been made, the fundamental inquiry is whether the minds of the parties agreed in regarding the instrument as taking effect immediately. If placed in the hands of a third person with such understanding and without condition or reserve, the law makes it a sufficient delivery.

3. **SAME**—*When a Contract Takes Effect from its Execution.*—When a paper shows upon its face that it is intended to take effect and operate from its execution, and is delivered to a third person, the presumption is that it was for safe keeping and not merely as an escrow or to take effect at a subsequent delivery.

Memorandum.—Injunction to restrain the prosecution of a suit at law. In the Circuit Court of Lake County; the Hon. CLARK W. UPTON, Judge.

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presiding. Decree for complainant; appeal by defendant. Heard in this court at the May term, 1894. Reversed and remanded with directions. Opinion filed December 13, 1894.

HOYNE, FOLLANSBEE & O'CONNOR, attorneys for appellant.

JOSEPH WRIGHT and HOMER COOKE, attorneys for appellee;
COOKE & UPTON, of counsel.

MR. JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

Appellant instituted a suit in the Circuit Court of Lake County against appellee to recover damages for breach of an alleged contract wherein appellee agreed to sell and convey to appellant 160 acres of land.

After the filing of the declaration appellee presented a bill in equity to enjoin the prosecution of the suit and have the contract declared void.

A temporary injunction restraining a prosecution of the suit at law was granted, and upon a hearing the Circuit Court rendered a decree making the injunction perpetual and setting aside the contract as null and void.

The evidence in the case is very voluminous. Much of it is utterly irreconcilable. We have examined it carefully and out of the great volume and many conflicts find the facts to be as follows:

In December, 1890, appellant began negotiations with appellee, an extensive farmer and land owner near Waukegan, Ill., for the 160 acres of land in question.

There were at the time rumors that a large manufacturing concern, The Washburn and Moen Mfg. Co., contemplated the removal of its plant to Waukegan. The effect of these rumors was to excite matters pertaining to real estate, as the location of the plant would enhance the value of lands in the vicinity. Both parties were fully advised of these rumors. Several interviews were had between them, but no definite agreement was reached, appellant not being willing to pay the fifty dollars per acre asked by appellee. On the 14th of January, 1891, however, appellant having concluded to purchase, sought appellee at his house, and

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learning there that he had gone to Milwaukee went to that place; finding appellee there, negotiations were renewed which resulted in the execution of the following contract:

In consideration of the sum of one dollar, the receipt of which is hereby acknowledged, to me in hand paid by James M. Condit, I, Robert Dady, agree to sell to James M. Condit, his heirs or assigns, 160 acres of land, located in section 32, Lake Co., Illinois, being the northwest quarter-section, known as the Jack Dugdale farm, at the sum of \$50 per acre, on the following terms: \$500 cash when I furnish an abstract showing a good and sufficient title; \$3,000 on or before August 1, 1891; one-fourth of the balance on or before August 1, 1894; one-fourth on or before August 1, 1897; one-fourth on or before August 1, 1900; one-fourth on or before August 1, 1903, with interest on deferred payments at six per cent per annum, payable semi-annually. Upon payment of the \$3,000 on or before August 1, 1891, I agree to give a warranty deed to the above described property, taking a mortgage on same for deferred payment. But in case of failure on the part of J. M. Condit to make said payment of \$3,000 I agree to accept \$500 additional as liquidation of all damages to myself.

In consideration of which I, James M. Condit, agree to purchase the above described property on the terms above mentioned. And in case of failure to make payment of \$3,000 on or before August 1, 1891, I agree to pay to Robert Dady, his heirs or assigns, \$500 additional, in liquidation of damages.

R. DADY,
JAMES M. CONDIT.

Milwaukee, January 14, '91.

Appellee is an illiterate man and is unable to write except to sign his name. The contract was written by appellant but, as we believe, was correctly read over to appellee before signing, and was fully understood by him.

After it was signed it was, by agreement of the parties, put in a sealed envelope and mailed to Charles Whiting, an attorney at Waukegan, with the following instruction in-

dorsed on the outside of the envelope: "Not to be opened until R. Dady and J. M. Condit call. Put in your safe."

At the same time appellee dictated a letter which appellant wrote to appellee's daughter apprising her that he had sold the land for \$150 per acre, and directing her to take the abstract of title which he held to a Mr. Jones, an abstract maker, have it brought down to date and, when finished, deliver to appellant or Messrs. Whiting & Upton.

Appellee then departed on the business engaging him, buying stock, to Mauston, Wis., and appellant returned to Waukegan. On his arrival at Muston, appellee received a letter from his daughter, stating she had heard that several farmers in the neighborhood had sold their farms for \$300 per acre and that the manufacturing plant was to be located at Waukegan. Appellee immediately returned and had his wife, who had taken the abstract to Jones to be carried down to date, procure its return.

A few days after the abstract was returned to Mrs. Dady appellant called at Jones' office to learn if the abstract was ready for him, and, learning that Mrs. Dady had taken it away, ordered a new one for himself. Finding the title satisfactory, he wrote appellee that he was ready to carry out the agreement and requested a meeting at Whiting & Upton's office for that purpose. Receiving no reply, he in a few days went to appellee's farm and made him a tender of the \$500 cash payment, which was refused. On the 30th of July, 1891, he made a tender of \$3,500, with notes and mortgage to secure deferred payments, drawn in accordance with the contract and demanded an execution of a deed.

Appellee refused the tender, refused to execute a deed, accused appellant of cheating him, and declined to have anything further to do with the matter.

A suit for breach of the contract followed, and pending the same, about two years afterward, this suit to enjoin it was commenced.

Two grounds are set up in the bill on which complainant bases his right to relief: First, that the contract was ob-

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tained by fraud; second, that the contract was never delivered.

It is claimed that appellant fraudulently obtained the contract by withholding information that the Washburn & Moen Mfg. Co. had decided to locate at Waukegan when he was in good conscience bound to communicate it, by false representations in that matter, made in the interview at Milwaukee, and by drawing a different contract from the one agreed upon and misreading it.

At the time the contract was made appellee knew the location of the manufacturing plant at Waukegan had been talked of for months. He knew the effect which the location would have on the value of his lands.

Even if appellant possessed the information which the bill charges he had, it is doubtful whether appellee is in a position to ask the contract to be annulled because appellant failed to communicate such information. But we fail to discover any evidence in the case showing that appellant possessed the information.

He expressly denies that he had any further information than the rumors which were in circulation and known by the public generally. Indeed, the first reliable and certain information upon the subject came when a mortgage was sent to Waukegan for record on the 16th day of January, 1891, two days after the signing of the contract at Milwaukee.

In support of the charge that appellant made false misrepresentations as to the coming of the manufacturing company the testimony of appellee alone appears in the record. It is confused and inconsistent and is met by explicit denial of appellant.

To justify a court in rescinding a contract executed by two parties, upon the ground that it was procured by fraud, the testimony must be of the strongest and most cogent character, and the case a clear one. *Walker v. Hough*, 59 Ill. 375. While the bill makes no charge of misreading the contract the testimony of appellee upon that matter was doubtless admissible as tending to characterize the conduct

of appellee at the time the contract was made and to aid in ascertaining the intention of the parties upon the subject of a delivery. Upon this point his testimony is so confused and contradictory as to render it untrustworthy and in view of the explicit testimony of appellant that the contract contained the exact terms which had been agreed upon and was correctly read over to appellee we are clearly of the opinion that such claim is not true.

Was there a delivery of the contract?

It is urged by counsel for appellee that from the written instructions upon the outside of the envelope addressed to Whiting alone, must be determined the intention of the parties as to delivery.

In support of this contention they invoke the aid of the familiar rule that all previous and contemporaneous verbal negotiations are merged in the writing executed by the parties. The arrangement as to what should be done with regard to the delivery, or rather non-delivery of the contract having been reduced to writing, no room is left for controversy on that point, it is urged, since if there had been any previous verbal understanding it would have been merged in the written instructions.

They contend, therefore, that the oral testimony as to what was previously said or done with reference to what disposition should be made of the contract, and what should be done toward carrying it out, becomes unimportant except in so far as it discloses the reason why appellee took the precaution he did to retain control over the contract. The answer to this contention is that the written instruction to Whiting, "Not to be opened until R. Dady and J. M. Condit call. Put in your safe," does not disclose the intention of the parties as to when the contract was to take effect. It amounted to nothing more than a mere direction to Whiting what to do with the envelope and its contents. Whether delivered to him in escrow or for safe keeping, or for what purpose, the written instruction did not disclose.

Certainly this is a case in which the surrounding circumstances as disclosed by parol proof must discover the intention of the parties. Evidence of what was said and done

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during the entire interview at Milwaukee was proper for that purpose. We do not understand that a manual delivery of the contract to appellant was necessary. As it imposed upon each party certain acts of performance, the safer mode and perhaps the most usual one would have been to execute the contract in duplicate and each party retain one. As appellee was pressed for time in taking his train for Mauston such a course was impracticable, however, and it was only natural that the contract should be placed in the hands of a third party for safe keeping. Such party, when agreed upon, became no more the agent of one party than the other.

Upon the subject of the delivery of a written contract or deed, the authorities are abundant that whatever physical disposition of the instrument may have been made, the fundamental inquiry is whether the minds of the parties were agreed in regarding the instrument as taking effect immediately. If placed in the hands of a third party with such understanding and without condition or reserve, the law makes it a sufficient delivery. *Gunwell v. Cockerill*, 79 Ill. 79; *Walker v. Walker*, 42 Ill. 311; *Bogie v. Bogie*, 35 Wis. 659; *McCullough v. Day*, 45 Mich. 554; *Buckman v. Buckman*, 32 N. J. Eq. 259.

The plain purport of the language of the instrument is that the contract was to take effect immediately. A careful consideration of the evidence and the conduct of appellee satisfies us that he so understood it.

When a paper shows upon its face that it is intended to take effect and operate from its execution, it would be very difficult to maintain the delivery to a third person was merely an escrow, or not to take effect until a subsequent delivery. *Hosley v. Holmes*, 27 Mich. 416.

We are of the opinion that the Circuit Court erred in annulling the contract and perpetually enjoining the suit at law.

The decree is therefore reversed, with directions to the Circuit Court to dissolve temporary injunction and dismiss the bill.

Reversed and remanded with directions.

LACEY, P. J., DISSENTS.

I dissent. The main question of dispute between appellant and appellee was as to the delivery of the contract. The appellee testified that the contract was not to be delivered until he had a chance to ascertain whether the Washburn & Moen Company had located its shops at Waukegan, and whether there had been any rise in real estate, and he is corroborated by the directions on the envelope. Appellee was away from home at the time. Appellant on the contrary testified that such was not the case and that the delivery was absolute. I think the evidence fairly established appellee's contention, or at least he so understood the arrangement. The minds of both parties did not meet, and therefore the contract of sale was not made complete by delivery.

Herman Classen v. Henry Danforth et al.

1. INJUNCTIONS—*Failure to Prosecute Diligently—Dismissed by the Court.*—In cases of injunctions more diligence in prosecuting the suit is required than in ordinary suits. Parties seeking the restraining order of a court should prosecute their suits in good faith and diligently, and bring all parties interested before the court. In case of a failure to do so it is within the province of the court, and is its duty, to dissolve the injunction and dismiss the bill.

2. EQUITY PRACTICE—*Restoration of Bill Once Dismissed.*—It is not according to the ordinary cause of practice to restore a bill that has once been dismissed. It must be shown that substantial justice requires it.

Memorandum.—Bill for injunction. In the Circuit Court of Iroquois County; the Hon. CHARLES R. STARR, Judge, presiding; bill dismissed for want of prosecution; appeal by complainant. Heard in this court at the December term, 1894, and affirmed. Opinion filed January 24, 1895.

C. H. PAYSON, attorney for plaintiff in error.

F. L. HOOPER and FREE P. MORRIS, attorneys for defendants in error.

Classen v. Danforth.

MR. PRESIDING JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

The plaintiff in error, a freeholder and tax payer of the incorporated village of Danforth, presented his bill for injunction to Judge Starr, one of the circuit judges of the judicial circuit of which the county of Iroquois forms a part, on the 18th of July, 1893, and on the 24th of same month the said judge granted an injunction. The bill was filed in the circuit clerk's office on the thirty-first day of the same month. The purpose of the bill was to enjoin the trustees of the village of Danforth from paying to Henry Danforth certain bonds issued by said village in 1891 for the purpose of building and erecting a system of waterworks in said village. The bonds were sold to defendant in error, Danforth, and the money paid into the treasury of the village and used for building a water tower and tank. The issue of bonds was in denomination of \$500 each, and the first became due and payable August 1, 1893.

The president and trustees of the village, to wit, W. W. Gilbert, president of the board, and John Overacher, John Eden, T. Simmans, Richard Gerloch, A. J. Grove and C. Kennedy, the trustees, and Henry Danforth, defendant in error, were by prayer of the bill made parties defendant thereto, and summons prayed to be issued against all but Henry Danforth, who resided in another country, and the most interested of all the parties. The bonds were sought to be enjoined on the ground alleged in the bill that they were issued by virtue of an ordinance attempted to be passed by the board of trustees attempting to create a liability of the village, and that in passing it, the provisions of the statute required such ordinances to be passed by a yea and nay vote, was violated, and that the ordinance under which the bonds were issued was not passed in the mode required and therefore they were void. All the respondents to the bill, except Danforth, were notified of the intended application for the injunction and he, as claimed by registered letter, and all were duly served with summons except Danforth, against whom no summons was issued.

At the November term of the Circuit Court, to wit, December 1, 1893, no steps having been taken in the matter by either the complainant or the respondents served, either to try the case or to dissolve the injunction, the court, it being the last day of the term, Judge Sample, presiding, on his own motion dissolved the injunction and dismissed the bill for want of prosecution. On the same day plaintiff in error moved to set aside the order of dismissal, without assigning any reason or filing affidavits in support of such motion, and the motion was denied by the court.

This writ of error is sued out from such order, and by order of this court the temporary injunction was revived until further order of this court. During the pendency of the suit in the court below, the respondents to the bill served neither answered nor made any move, and the respondent most deeply interested, although known to the complainant, was not served, and so far as the record discloses, knew nothing of the pendency of the suit or the issuing of the injunction and could take no steps in the matter.

From the want of action of the other parties to the suit, it was apparent to the presiding judge that they were perfectly satisfied to allow the temporary injunction to remain indefinitely without further action. The court could perceive that an injustice was being done the most interested party of the suit, the defendant in error, Danforth.

The cause was evidently not being prosecuted as it should have been and as good faith required. It had the appearance of an *ex parte* proceeding of the tax payer and the village on the one side, and no one to represent Danforth, the owner of the lands, the payment of which was enjoined on the other, who was not in court and apparently was not desired to be there.

Without some showing or explanation, the Circuit Court was justified in dismissing the bill for want of prosecution.

The plaintiff in error was guilty of *laches* in not getting all parties in court. In cases of injunctions, more diligence in prosecuting the suit is required than in an ordinary suit. Parties seeking the restraining order of court should prose-

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cute their suit in good faith and diligently, and bring all parties interested before the court. And in failure so to do, it is within the province of the court and it is its duty to dissolve the injunction and dismiss the bill. *Atkins v. Billings*, 72 Ill. 598; *Hopkins v. Roseclare Lead Co.*, 72 Ill. 373.

The court did not err in refusing to set aside the order of dismissal; nothing was brought to its attention to show that the suit was being prosecuted diligently and in good faith and in the exercise of sound discretion. It was justified in refusing to set aside the order of dismissal. Had Danforth, the plaintiff in error, been brought into court, he might have shown that the record of passing the ordinance in question was in legal form, or in case any error had been committed in making up the record of the village trustees, he may have taken steps to have it corrected and amended. *Village of Belknap v. Miller*, 52 Ill. App. 617; *Bass v. Auburn*, 89 Ill. 361. All improper delays would tend to prejudice his rights. The discretion of the Circuit Court must be abused before it will be interfered with. *Hett v. Collins*, 103 Ill. 74.

It is not according to the ordinary course of practice to restore a bill that has once been dismissed. It must be shown that substantial justice requires that it should be done, and then, upon the particular circumstances, the court will make the order. 1 Dan. Chan. P. & P., page 809, Perkins' Ed.

The order of this court renewing the injunction is set aside and the injunction heretofore issued by this court dissolved, and the decree of the court below dissolving the injunction and dismissing the bill for want of prosecution is affirmed.

Norman Frame & Son v. Perry W. Murphy.

1. INSTRUCTIONS—*Failure to Mark Given.*—While the statute requiring the trial judge to mark instructions on the margin "given" or "refused," is directory and should be obeyed, a judgment will not be reversed merely because the instructions were not marked "given" when the record shows they were given.

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2. APPELLATE COURT PRACTICE—*Reasons Not Set Out in the Motion for a New Trial, Waived.*—Where an unsuccessful party has filed certain points in writing, particularly specifying the grounds of his motion for a new trial, he will be confined in the Appellate Court to the reasons specified in the court below, and must be considered as having waived all causes for a new trial not set out in his motion.

Memorandum.—Trover. In the County Court of McHenry County; the Hon. C. H. DONNELLY, Judge, presiding. Trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the December term, 1894, and affirmed. Opinion filed January 24, 1895.

JOSLYN & CASEY, attorneys for appellants.

V. S. LUMLEY, attorney for appellee.

MR. JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This is an action of trover by appellee against appellants to recover the value of sixty-four bushels and twenty pounds of cucumbers which were placed in appellant's pickle factory at Woodstock, Ill., to be salted and cured.

There was a recovery in the County Court for \$75.26.

The evidence shows that a crop of 735 bushels of cucumbers was raised on the farm of appellee under an arrangement with one Thomas Green, that appellee should furnish the land, a horse and cultivator, and Green should cultivate and gather the crop, the proceeds to be divided equally. Under their agreement the 735 bushels were placed in appellant's factory to salt and cure for fifteen cents per bushel. While the cucumbers were being hauled to the factory, Green obtained from appellants, four dollars, and appellee twenty-five dollars. The cucumbers were stored in appellee's name and shortly afterward appellee bought Green's interest. Appellee then sold to an eastern buyer by the name of Moody, at one dollar per bushel, subject to salting and curing contract of fifteen cents per bushel. Appellants delivered all to Moody except the sixty-four bushels and twenty pounds in controversy which they claimed to have

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bought at forty-five cents per bushel, and paid for in the four dollars to Green and the twenty-five dollars to appellee.

The chief contention of appellants is that the pickles in controversy were purchased by them. It is claimed by them that the contract of purchase was made by Norman Frame with Green at the time the latter received the four dollars and subsequently confirmed by appellee at the time he received the twenty-five dollars. This is denied by appellee and both he and Green swear that the amounts received by them were simply borrowed. Here was a conflict coming most fitly within the province of the jury for decision. There is nothing to indicate that they were actuated by passion or prejudice, or that they misapprehended the facts. In fact we think they were led to their decision by a preponderance of the evidence.

It is claimed that the cucumbers were bought of Green, yet there was no entry made of such purchase from him upon the books of appellant. An explanation for this is advanced in the fact that no account was opened with Green, but that the entire account was carried in the name of appellee. But there was no entry of the sale made at the time in the account of appellee, and some time afterward William Frame, a member of the firm, who kept the books, accepted a return of the twenty-nine dollars from appellee who stated at the time it was money borrowed from Norman Frame. This amount was retained until appellee made a formal demand of the pickles for the purposes of this suit when appellants offered to pay it back. If the pickles were really purchased it seems somewhat strange that no entry of that fact should be made upon the books at or near the time, and that the twenty-nine dollars which had been paid to appellants as a return of borrowed money should be retained until the taking of the first step in the direction of a suit.

The necessary demand and tender of the amount due for salting and curing was sufficiently proven.

The evidence tended to show that Moody paid the fifteen cents per bushel for the salting and curing of the pickles

taken by him. Appellants did not deny that he had and upon the trial laid no claim to the pickles in controversy on that score, but claimed them solely upon the ground of purchase.

We see no error in the instructions given to the jury.

The court failed to mark any of the instructions offered as "given" or "refused" and for that reason it is urged the judgment should be reversed.

It appears from the record what instructions were read to the jury and what were refused. The only two offered by appellants were read. While the statute requiring the trial judge to mark instructions on the margin "given" or "refused" is directory and should be obeyed, a judgment will not be reversed merely because the instructions were not marked "given" when the record shows they were given. *Cook v. Hunt*, 24 Ill. 550; *McKenzie v. Remington*, 79 Ill. 388; *Tobin v. The People*, 101 Ill. 388.

The neglect of the court to mark the instructions was not specified as one of the grounds for a new trial in the motion filed by appellants in the County Court.

Where an unsuccessful litigant has filed certain points in writing, particularly specifying the grounds of his motion for a new trial, he will be confined in the Appellate Court to the reasons specified in the court below, and must be considered as having waived all causes for a new trial not set forth in the written grounds. *The Ottawa, Oswego & Fox River Valley R. R. Co. v. McMath*, 91 Ill. 104; *Chicago & Alton R. R. Co. v. Elmore*, 32 Ill. App. 418. Judgment affirmed.

**Hutchinson National Bank v. John W. Crow, Defendant
in Attachment, Martin Crow, Jr., Interpleader.**

1. INSTRUCTIONS—*Where the Case is Close upon the Facts.*—Where a case is close upon the facts the right of the parties can not be preserved unless the jury are accurately instructed.

2. SAME—*Good Faith of Property Transfers.*—In attachment pro-

ceedings, where the theory of the plaintiff is that the defendant was the real owner of the property in question, and that while pretending to act as the agent of another he was acting for himself, said other person having claimed the property by interpleader, an instruction on the part of the interpleader which ignores the good faith of the transaction by which he acquired the property, is erroneous.

8. *SAME—Fraud—Degree of Proof.*—It is error to instruct the jury that the party alleging fraud must prove it by a preponderance of the evidence so clear and cogent that it leaves the mind well satisfied that the charge is true. The law does not require such a degree of proof in a civil suit. It is sufficient if the jury believe a material fact in issue from the evidence, even if the proofs do not generate a belief which entirely satisfies their minds.

4. *WITNESSES—Credibility of—Instruction.*—It is only in cases where it is palpable that a witness has deliberately and intentionally testified falsely as to some material matter and is not corroborated by other evidence, that a jury is warranted in disregarding his testimony.

5. *SAME—Mistake as to Part of His Evidence.*—Although a witness may be mistaken as to some part of his evidence, it does not follow as a matter of law that he has willfully told an untruth or that the jury would have the right to reject his testimony.

6. *ATTACHMENT—Equitable Interests Not Subject To.*—Equitable interests are not subject to attachment. If one conveys his property to another and by some secret agreement retains an interest and use in it, such conveyance and the holding of such secret use is fraudulent as to all persons who may become his creditors; but in a court of equity, and not in a court of law, must be found the relief.

7. *FRAUD—Allegation and Proof.*—Where one seeks to attack a transaction as fraudulent, he must set forth in his pleading the facts constituting the fraud; but where the question of the title of property attacked arises upon an interplea of a claimant, it devolves upon the interpleader to establish his title, and any fact in disproof thereof can be shown under the traverse contained in the general replication.

Memorandum.—Attachment. In the Circuit Court of Iroquois County; the Hon. CHARLES R. STARR, Judge, presiding. Trial upon an interpleader; verdict and judgment for the interpleading claimant; appeal by the plaintiff in attachment. Heard in this court at the December term, 1894. Reversed and remanded. Opinion filed January 24, 1895.

BRIEF FOR PLAINTIFF IN ERROR, C. W. RAYMOND, FREE P.
MORRIS AND F. L. HOOPER, ATTORNEYS; JAMES
MCKINSTRY, OF COUNSEL.

The burden of proof is unquestionably upon the interpleader to prove property in himself. If he fails to do this,

or if the evidence shows the property to belong to the defendant in attachment, or to a third person, or if the evidence shows but a qualified right of property in the interpleader, or if it is owned by him jointly with another, he must fail upon the issue tendered by him. *Marshall v. Cunningham*, 13 Ill. 20; *Ripley v. People's Savings Bank*, 18 Brad. 430; *Hanson v. Dennison*, 7 Brad. 73; *Com. Nat. Bank v. Canniff*, 51 Ill. App. 579; *Waples on Attachment*, 481; *Bostwick v. Blake*, 145 Ill. 85.

The right of the plaintiff in error to attack prior fraudulent transfers is unquestionable. 1 Am. & Eng. Ency. of Law, 930.

A conveyance made in fraud of creditors is void as to them, not merely voidable. For all purposes of appropriating the property to the satisfaction of the creditor's demands the property is to be deemed vested in the debtor. *Bostwick v. Blake*, 145 Ill. 85; *McKinney v. Farmers Nat. Bank*, 104 Ill. 183.

The rule as to the rights of precedent and subsequent creditors to attack conveyances for fraud is as follows:

1. If the grantor reserves no future use or benefit in the property then the sale can be attacked only by a pre-existing creditor.

2. But where the conveyance is merely colorable and a secret trust and confidence exist for the benefit of the grantor, then the sale is void, both as to precedent and subsequent creditors. *Bostwick v. Blake*, 145 Ill. 90; *Gordon v. Reynolds*, 114 Ill. 127; *Jones v. King et al.*, 86 Ill. 225; *Guffin v. First Nat. Bank*, 74 Ill. 259; *Bump on Fraud. Con.*, 319.

A conveyance, whereby the grantor or vendor is to have the beneficial enjoyment in whole or in part of the property transferred, is fraudulent and void as to creditors. *Mitchell v. Sawyer*, 115 Ill. 656; *Power v. Alston*, 93 Ill. 590.

In order to render a conveyance or transfer of property fraudulent or void as against creditors, it is not necessary that the debtor shall in person convey his property, but it

will be sufficient if done through the intervention of a third person, by the consent and procurement of the debtor, with the secret understanding that the property is to be held for the former owner, the debtor. *Bostwick v. Blake*, 145 Ill. 85.

Where a creditor conveys property to be held wholly or in part in secret trust for his benefit and enjoyment, it matters not that the transaction may be upon a valuable consideration, for it lacks the element of good faith and is fraudulent in law. In such a case the fraud being a continuing one, this conveyance will be void, both as to existing and subsequent creditors. *Bostwick v. Blake*, 145 Ill. 89; *Moore, Admr., v. Wood*, 100 Ill. 454; *Beidler v. Crane*, 135 Ill. 98; *Lukin v. Aird*, 6 Wall. (U. S.) 78.

For although such a transaction may be upon a valuable consideration, it lacks the element of good faith; for, while it professes to be an absolute conveyance on its face, there is a concealed agreement between the parties to it inconsistent with its terms, securing a benefit to the grantor at the expense of those he owes. A trust thus secretly created, whether so intended or not, is a fraud on creditors, because it places beyond their reach a valuable right and gives to the debtor the beneficial enjoyment of what rightfully belongs to his creditors. *Lukin v. Aird*, 6 Wall. (U. S.) 78.

A transfer of property must not only be upon a good consideration, but it must also be *bona fide*. Even though the grantee or assignee pays a valuable, adequate and full consideration, yet if the grantor or assignor sells for the purpose of defeating the claims of his creditors, and such grantee or assignee knowingly assists in effectuating such fraudulent intent, or even has notice thereof, he will be regarded as a participator in the fraud, for the law never allows one man to assist in cheating another. *Biedler v. Crane*, 135 Ill. 99.

The foregoing principles apply to conveyances and transfers of personal as well as real estate. Sec. 4, Frauds and Perjuries, R. S., Ch. 59; *Moore, Admr., v. Wood*, 100 Ill.

454; *Gordon v. Reynolds*, 114 Ill. 127; *Twyne's Case* and note, 1 *Smith's Leading Cases*, 33.

Where it is sought to impeach transactions upon the ground of fraud, the facts constituting such fraud must be properly pleaded. 8 A. & E. Ency. of Law, 653; *Jones v. Albee*, 70 Ill. 34; *Slack v. McLagan*, 15 Ill. 249; *Ward v. Luneen*, 25 Ill. App. 160.

The facts constituting fraud must be clearly set forth. *Beatty v. Nickerson*, 73 Ill. 605; *Call v. Joliet Opera House Co.*, 79 Ill. 96; *Hopkins v. Woodard*, 76 Ill. 62; *Puterbaugh P. & P.* 193.

BRIEF FOR THE DEFENDANT IN ERROR, SILAS RHODES, SAMUEL MCROBERTS, GEORGE W. W. BLAKE AND
C. H. PAYSON, ATTORNEYS.

There can be no such thing as fraud in law, with reference to subsequent creditors. To make the transfer void as to them, there must exist at the same time, on the part of the grantor, an actual fraudulent intent and purpose to place his property beyond the reach of existing creditors. *Bump on Fraudulent Conveyances*, 315-317.

Subsequent creditors have no right to claim an interest in property conveyed prior to the creation of the debt, and can not avoid it. *Bridgeport v. Little*, 55 Ill. 261; *Pratt v. Myers*, 56 Ill. 24; *Williams v. Davis*, 69 Pa. St. 21; *Case v. Phelps*, 39 N. Y. 164; *Hughes v. Manty*, 24 Iowa, 499; *Wright v. Howell*, 35 Iowa, 292; *Thatcher v. Pliny*, 7 Allen (Mass.) 150; *Beal v. Warren*, 2 Gray (Mass.) 447; *Larimer v. Campbell*, 60 Bush. (Ky.) 62.

Proof must be clear and conclusive, and not only of the facts that may constitute a fraud, but a fraudulent intent must be shown. *Brown v. Berman H. & Co.*, 24 Ill. App. 574; *Show v. Farwell*, 9 Brad. 256.

To render a sale fraudulent both parties must be participants in the fraudulent intent. *Schroeder v. Walsh*, 120 Ill. 403.

The presumption of the law is that the transaction was fair and free from fraudulent intent, and the fact that it was

between father and son does not change this presumption. One has a right to deal with his own relations, to buy and sell to and from them, and when a consideration is proven, such a transaction is not regarded in the law any different than dealings between strangers. *Show v. Farwell*, 9 Brad. 256; *Bowden v. Bowden*, 75 Ill. 111.

The fact that an uninventoried stock of goods was sold on credit to a relative, is not evidence of fraud, nor could fraud be inferred, if defendant had been in debt at time of selling, which was the case in reference to the property. *Nelson v. Smith*, 28 Ill. 495.

Debtors in failing circumstances may prefer one creditor to another. *Schroeder v. Walsh*, 120 Ill. 403; *Waddams v. Humphrey*, 22 Ill. 661; *Anderson v. Smith*, 5 Black. 295; *Bennet v. McGuire*, 58 Barb. 625; *Frank v. Peters*, 9 Ind. 344; *Butlers v. Houghwout*, 42 Ill. 18.

MR. JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

On the 27th of February, 1892, plaintiff in error sued out of the Circuit Court of Iroquois County, a writ of attachment against John W. Crow claiming that he was indebted to it in the sum of \$1,725.64; that he was a non-resident of the State, and had within two years fraudulently conveyed, canceled and disposed of his property so as to hinder and delay his creditors. The writ was levied upon forty-one horses and some farming implements.

At the June term, 1893, Martin Crow, Jr., defendant in error, filed an interpleader claiming to be the owner of the horses. At the November term, 1893, judgment by default was entered against John W. Crow for \$1,805.06 and at the March term, 1894, a trial was had upon the interpleader resulting in a verdict and judgment in favor of Martin Crow, Jr. To review the proceedings and trial resulting in the last mentioned judgment this writ of error is prosecuted.

John W. Crow and Martin Crow, Jr., are brothers. Martin Crow, Sr., is their father.

In 1886 and 1887 John W. Crow and his father resided at Hutchinson, Kansas, and were there engaged in speculating

in real estate. John W. was a large operator in city property and farm lands, owning at one time real estate valued at \$300,000. He and his father were not general partners but were jointly interested in certain deals into which he had induced his father to enter. To raise money to carry on his operations it became necessary to give mortgages, and in this way John became involved to the amount of \$200,000.

At a settlement had between them in the latter part of 1887, it is claimed that John was found to be indebted to his father \$10,000, and in payment conveyed to him four lots in Hutchinson on which stores were situated. The expressed consideration in the deed was \$20,000, and it was executed November 30, 1887, but was not filed for record until January 29, 1889. During the interval between the date of the deed and the time of its being recorded, John became indebted to the plaintiff in error. He also continued to control and exercise rights of ownership over the property.

In the spring of 1890, John, assuming to act for his father, negotiated a trade of this business property with one W. H. Hubbard for several lots in Clinton, Iowa, on which a large hotel was located, paying therefor a difference of \$2,000 and assuming the payment of a mortgage upon the hotel property for \$10,000. The deed to the hotel property was made to the father on the 16th of April, 1890, and was upon the expressed consideration of \$55,000. John soon took charge of the hotel under a letting from his father at a rental of \$600 per year, and continued to operate it for nearly three years. He found the property in a very dilapidated condition and with poor custom. By putting extensive repairs on the house and giving the business close attention he so improved the character and custom of the house as to make it yield a good income, about all of which he expended in improving the property.

On the 30th of December, 1890, Martin Crow, Sr., executed to Martin Crow, Jr., a deed to this property at the expressed consideration of \$65,000, subject to the \$10,000 mortgage above spoken of. He also gave him a bill of sale to all the

hotel furniture, two omnibuses, one baggage wagon, five horses and the harness for them. John continued operating the hotel after the title passed to his brother Martin, upon the same terms that he had with his father.

On the 2d of April, 1891, Martin Crow, Jr., executed and delivered to John, a power of attorney to sell, convey or mortgage this property in such way as he should see fit. On the 29th of May, 1892, he gave to his brother, John, another power of attorney, authorizing him, for a period of twenty-five years, without revocation, to buy, sell, mortgage and improve for him any real estate in Clinton, Iowa, or in the State of Iowa, or in any locality within the bounds of the United States. Under the authority of this last power of attorney, John, in January, 1893, exchanged the hotel property for a farm in Iroquois county, Illinois, and the stock of horses brought in question by the interplea.

At the time Martin Crow, Sr., conveyed the hotel property to his son Martin, December 30, 1890, he was himself largely indebted to various parties. It is claimed that he owed his son Martin \$4,300 and that the debt was the real consideration for the conveyance. Martin Crow, Jr., is a young unmarried man, without any settled place of abode. For the last ten or twelve years he had wandered about the country, from place to place, working as a farm hand, a laborer in a sugar refinery, a house painter, a cook and a clothes washer. During that period he has lived for short spaces of time at Kansas City, Memphis, New Orleans, Cincinnati, New York City, Clinton, St. Louis, and at six different places in the State of Kansas. He is a notable exception to the old adage, "a rolling stone gathers no moss," because, out of his weekly earnings, he was able in a few years to send his father enough (with interest) to amount to \$4,200.

Upon the part of the bank it was contended upon the trial that while the legal title to the four business lots and buildings in Hutchinson was conveyed to Martin Crow, Sr., upon the pretended consideration of \$10,000, the property was really owned by John W. Crow; that the trade of this property for the hotel property at Clinton, Iowa, was ma-

nipulated by John W. Crow, for his own use and benefit; that he procured the conveyance of the hotel property from Martin Crow, Sr., to Martin Crow, Jr.; that the consideration for such conveyance was fictitious; that he also manipulated the trade of the hotel property for the section of land in Iroquois county and the property attached; that during all the time that the legal title to the property was in the father and the brother of John W. Crow he was in fact the real owner of the same and that the placing of the legal title in them was to shield the property from John's creditors.

The testimony is quite voluminous and while it would render this opinion too lengthy to enter upon the discussion of it in detail we do not hesitate to say that there is fair room for the contention of plaintiff in error as against the sworn denials of the father and two sons, and the evidence strongly tends to show fraud. The jury should have been carefully instructed and it is easy to understand how error in that regard could mislead them. Where a case is close upon the facts the rights of the parties can not be preserved unless the jury are accurately instructed.

At the instance of the interpleader the court gave the following instruction :

"The court instructs the jury that a party in possession as tenant of property may also legally act as the agent of the owner, and if you believe in this case from the evidence that John W. Crow was the tenant and agent of the interpleader, then in that case the law is that no statement made or act done by such tenant or agent claiming ownership, made or done in reference to the property in which he is such tenant or agent, can bind or affect the title or interest of this interpleader unless he was present and assented to the same or that he thereafter ratified the same."

This instruction would be correct if the good faith of the transaction was not involved. The position of the plaintiff was that John W. Crow was the real owner of the property, and while pretending to act as the agent of another, he was acting for himself. If the interpleader had not acquired the property in good faith, and was but a mere title holder to

enable his brother to hinder and delay creditors, any statement made or act done with reference to the property by the brother, while assuming to act as an agent or tenant, would affect the interest of the interpleader. The instruction is bad for the reason that it ignores the question of good faith.

The fifteenth instruction for the interpleader told the jury that they should find for him, unless they believed from the evidence that the transaction and sale of the property in the case was not *bona fide* and for a valuable consideration. The property involved in this case is the forty-one horses, and there is no question but that the trade with Manske of the hotel property for the horses and land was in good faith.

The eighteenth instruction for the interpleader is as follows:

"The court instructs the jury for the interpleader that when fraud is set up the party alleging fraud must prove it by a preponderance of the evidence, so clear and cogent that it leaves the mind well satisfied that the charge is true. And in this case if you believe from the evidence that the plaintiff in attachment has not so proved the fraud alleged in this case, you should find for the interpleader, if you believe from the evidence the property is his."

The law does not require such a degree of proof in a civil suit. It is sufficient if the jury believe a material fact in issue from the evidence, even if the proofs do not generate a belief which entirely satisfies their minds. *Mitchell v. Hindman*, 47 Ill. App. 431; *Connelly v. Sullivan*, 50 Ill. App. 629; *Herrick v. Gary*, 83 Ill. 85; *Stratton v. Central Ry., etc.*, 95 Ill. 25.

The twenty-eighth instruction is subject to the same objection as the one first above quoted.

The instructions were very numerous, and many of them so involved as to confuse the jury. Less than one-fourth the number given was ample to convey all the legal principles involved.

The instructions offered by the plaintiff relating to a secret trust retained by John W. Crow in the property, were prop-

erly refused by the court. Equitable interests are not subject to attachment. It is true that if one conveys his property to some one, and by some secret agreement, retains a secret interest and use in the property conveyed, such conveyance, and the holding of such secret use is fraudulent as to any and all persons who may become his creditors, but in a court of equity and not in a court of law must be found the relief. We do not see how the questions of a secret trust and use can arise in this case. Either John W. Crow or Martin Crow, Jr., is the true owner of the property attached. If the latter purchased the Clinton Hotel property in good faith, without any knowledge of any attempt or design on the part of his brother or father to defraud creditors, he is entitled to the property claimed in his interplea. If he did not purchase the hotel property in good faith, and was being used as a mere instrument to effectuate the fraudulent designs of his brother, he is not entitled to it and the attachment should hold it.

We differ from counsel on both sides as to the latitude of proof permissible under the general replication to the interplea. The court sustained demurrers to special replications denying that the interpleader was the true owner of the property; and setting up the various transactions which constituted the fraud of himself, his father and brother. In this, it is claimed by counsel for plaintiff in error, the court erred, because where it is sought to impeach transactions upon the ground of fraud, the facts constituting such fraud must be specially pleaded. Upon the other hand, it is contended by counsel for the interpleader in the additional brief filed, that, as no amended replication setting up the facts constituting the alleged fraud was filed, all proofs of fraud were improper, and that plaintiff in error can not now insist that the verdict is against the evidence.

The authorities are abundant that, where one seeks to attack a transaction as fraudulent, he must set forth in his pleading the facts constituting the fraud; yet where the question of ownership of property already attached, arises upon the interplea of one claiming it, it devolves upon the inter-

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pleader to establish his title, and any fact in disproof thereof can be shown under the traverse contained in the general replication.

Complaint is made of the refusal of the court to allow certain questions to John W. Crow on his cross-examination, but such latitude was allowed in the cross-examination of the witness, that we do not think the plaintiff in error suffered thereby.

For the errors of the court in instructions to the jury, the judgment must be reversed and the cause remanded.

John C. Owens v. The People, etc.

1. **INTOXICATING LIQUOR—Sales under Permit for Medicinal Purposes.**—Upon the trial of an indictment for unlawful sales of intoxicating liquor, where a permit to sell for medicinal, chemical, mechanical and sacramental purposes, is relied upon as a defense, the defendant has the right to have submitted to a jury the good faith of his sales under the permit.

2. **SAME—Druggist's Sales, a Question of Good Faith.**—The sale of liquor by a druggist holding a permit to sell for medicinal, chemical, mechanical or sacramental purposes, is legal, if he acts in good faith, and under such circumstances as are sufficient to create in the mind of a reasonable man a belief that the liquor is bought for a purpose authorized by the permit.

3. **SAME—The Holder of a Permit Need Not Necessarily be a Pharmacist.**—The holder of a permit to sell intoxicating liquor for medicinal, mechanical, sacramental and chemical purposes, need not necessarily be a pharmacist, within the meaning of the act of 1881 relating to pharmacists. Paragraph 43, Sec. 1, Art. 5, Chap. 24, R. S., authorizes the granting of such permits by cities and villages.

Memorandum.—Indictment for selling intoxicating liquors. In the Circuit Court of Will County; the Hon. CHARLES BLANCHARD, Judge, presiding. Trial by jury; verdict of guilty; appeal by defendant. Heard in this court at the December term, 1894, and affirmed. Opinion filed January 24, 1895.

MORRILL SPRAGUE and E. MEERS, attorneys for plaintiff in error.

EDWARD C. AKIN, State's Attorney, for defendant in error.

MR. JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

The plaintiff in error was indicted and convicted under the dram-shop act for selling intoxicating liquors without a license. He was a druggist in the village of Plainfield and had a permit from the village board to sell liquor for medicinal, chemical, mechanical and sacramental purposes issued in pursuance of an ordinance of the village. He defended under the permit.

There was evidence for the people sufficient to justify a finding that some of the sales were for use as a beverage and not in good faith as a medicine, but plaintiff in error claimed and testified that all sales made by him were made for medicinal purposes only. He had the right to have that question submitted to the jury so that they could determine whether the sales were made in good faith for that purpose.

For the people the court gave the following instruction:

3. The court instructs the jury that a pharmacist selling intoxicating liquor under a permit from the board of trustees of a village, assumes all the hazards of the business, and makes the sale of such liquors at his peril. And if such pharmacist sells intoxicating liquor to one who purchased the same for the purpose of using it as a beverage, and who afterward does use it for such purpose, such a pharmacist is guilty of an unlawful sale of intoxicating liquor, even though such purchaser should falsely state that the liquor was wanted for medicinal purposes.

Under this instruction no matter how honest the purpose of a druggist selling under a permit for medicinal purposes, he could be visited with punishment if a purchaser could by deception as to the intended use of the liquor induce a sale of it. The sale of liquor by a druggist holding a permit like the one in evidence is legal if he acts in good faith and under such circumstances as are sufficient to create in the mind of a reasonable man belief that the liquor is bought for a purpose authorized by the permit. *Commonwealth v. Joslin*, 158 Mass. 482; *Commonwealth v. Gould*, Id. 499.

This holding is not in conflict with the decisions of our

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Supreme Court, that the good faith and honesty of purpose of a dram-shop keeper indicted for selling to a minor is no defense. One is licensed to sell for a beverage, the other permitted to sell for a medicine. The Supreme Court of Massachusetts is in accord with our Supreme Court on the question of good faith as to sales to minors, as will be seen by reading the opinions in the above cited cases.

But the state's attorney contends that the defense of sales under the permit should not prevail because plaintiff in error did not show that he was a pharmacist within the meaning of the act of 1881, relating to pharmacists, and that the third section of the dram shop act of 1883, under which the defense was predicated, authorizes municipal authorities to grant permits only to regular pharmacists.

There would be some force in this contention if the power to grant such a permit rested alone in the dram shop act. Paragraph 46, Sec. 1, Art. V, Chap. 24, R. S., relating to cities and villages, expressly provides for the granting of permits to druggists for the sale of liquors for medicinal, mechanical sacramental and chemical purposes. The provision has never been repealed or in anywise curtailed by subsequent legislation. The permit in evidence is on its face denominated a "Druggist's Permit," and seems to have been issued under that paragraph.

For the error of the court in giving the above quoted instruction, the judgment must be reversed and the cause remanded for another trial.

**Robert Scott and F. C. Dixon v. Milward H. Rogers, for
the use of Abraham Beard, and Nathan
Beard, Executors of the Last Will
of Abraham Beard.**

1. *ACT OF GOD—When Not an Excuse for Failure to Return Property.*
—One who wrongfully takes the property of another, although under a writ of replevin, can not escape liability for the value of the property by showing it was destroyed by the act of God.

2. **ATTORNEY FEES**—*Suit on a Replevin Bond*.—Fair and reasonable attorney fees expended by a successful defendant in a replevin suit may be subsequently recovered in an action of debt on the replevin bond.

3. **PRACTICE**—*Absence of a Bill of Exceptions*.—In the absence of a bill of exceptions, no questions can be considered in the Appellate Court except such as arise upon the holding of the court below in settling the pleadings.

Memorandum.—Debt. In the Circuit Court of Mercer County; the Hon. JOHN J. GLENN, Judge, presiding. Declaration on a replevin bond; trial by jury; verdict and judgment for plaintiff; error by defendant. Heard in this court at the December term, 1894, and affirmed. Opinion filed January 24, 1895.

BRIEF FOR PLAINTIFFS IN ERROR, L. D. THOMASON, ATTORNEY.

Anderson's Law Dictionary defines "act of God" as being such inevitable accident as can not be prevented by human care, skill or foresight, but which results from natural causes, such as lightning and tempest, floods or inundations, something superhuman, or something in opposition to the act of man. In the case of Ill. Cen. R. R. Co. v. Bethel, 11 Brad. 26, this court said: "Such a flood is said to be a visitation of Providence, and the destruction it brings with it must be borne by those to whom it happens to fall." Thus recognizing the plea of act of God as a good defense.

A storm of unusual or extraordinary violence. Phil., etc., R. R. Co. v. Anderson, 6 Am. & Eng. R. R. Cases, 407. A storm greater and more destructive than had been experienced within forty years. Nashville, etc., R. R. Co. v. Davis, 6 Heisk. (Tenn.) 261; Nashville, etc., R. R. Co. v. King, 6 Heisk. (Tenn.) 269.

The freezing of a canal or river. Bowman v. Teal, 63 Mo. 230; Wolf v. Am. Ex. Co., 43 Mo. 422.

Lightning, earthquake, sudden death or illness. Gillott v. Ellis, 11 Ill. 579.

And where the plaintiff was injured by the fall of a liberty pole, caused by a gale of wind, it was held that no one was responsible to him. Alleghany v. Zimmerman, 95 Pa. St. 287.

It is a well established law that a carrier of goods is not

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liable for loss or damage which happens through the act of God, the enemies of the State, etc. 2 Thompson on Trials 1344, Sec. 1850; Forward v. Pittard, 1 T. R. 27.

BRIEF FOR DEFENDANTS IN ERROR, PEPPER & SCOTT,
ATTORNEYS.

One who wrongfully takes the property of another, though under a valid writ of replevin, can not shield himself from liability for the value of the same on the ground that after such taking the property has been destroyed by inevitable accident. Suppiger v. Gruaz, 137 Ill. 216; Same v. Same, 36 Ill. App. 60; Schott v. Youree, 142 Ill. 233; Cobbey on Replevin, Sec. 830.

It has been repeatedly held by the Appellate Court that a successful defendant in a replevin suit can recover, in a suit on the bond, the amount of attorney's fees necessarily incurred in defending his right to his property and securing the return thereof. Hartz v. Wendell, 26 Ill. App. 274; Dalby v. Campbell, 26 Ill. App. 502; Horner v. Boyden, 27 Ill. App. 573; Seigel v. Hanchett, 33 Ill. 634.

To the same effect is Cobbey on Replevin, Sec. 1358.

MR. JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This suit was commenced against the plaintiffs in error upon a replevin bond, executed to Rogers, as constable, in a certain replevin suit for a heifer, by Robert Scott against Abraham Beard and Nathan Beard. There was a recovery against the plaintiffs in error.

There is no bill of exceptions, and all the questions for our consideration arise upon the holdings of the court below in settling the pleadings.

The declaration recites the execution and delivery of the bond, the replevin of the property, a trial of the right of it, and a finding against Scott, an order of *retorno*, and a failure to return the property in compliance with the order and judgment. The bond was executed to *Melville H. Rogers*, and the *præcipe*, summons and declaration contained the name of *Melville H. Rogers*, as nominal plaintiff, instead of

Milward H. Rogers, the true name of the nominal plaintiff. A plea in abatement having been filed, the *præcipe*, summons and declaration were, upon leave of the court, so amended as to make *Milward* H. Rogers nominal plaintiff.

We see no force in the objection that the bond, the approval of it, and other papers, were not amended to correspond with the *præcipe*, summons and declaration. The bond was not given in this suit and could not be amended in it.

To the amended declaration, plaintiffs in error plead: 1. *Nil debet*. 2. Failure of the jury to find the value of the property in the replevin suit. 3. Failure of the court to enter alternative judgment in that suit. 4. Impossibility of returning the property, because it was dead at the time of the trial of the replevin suit. 5. That the death of the property was the act of God. To all of which the court sustained a demurrer.

The court properly sustained a demurrer to these pleas. Plaintiffs in error offer no argument in support of any but the fifth. That reads: "And for a further plea in this behalf, defendants say that the plaintiff ought not to have his action against them, because they say the death of the property in question was an act of God, and that they are not liable therefor, and this they are ready to verify."

Aside from the objection that the plea does not aver that the property died after the institution of the replevin suit, the plea is bad because one who wrongfully takes the property of another, although under a writ of replevin, can not escape liability for the value of the property by showing it was destroyed by act of God. *Cobbey on Replevin*, Sec. 330: *Suppiger v. Gruaz*, 137 Ill. 216.

The court again allowed the declaration to be amended. It was amended so as specifically to set up as damages the attorney fees paid out in defending the replevin suit. Plaintiffs in error again demurred, but the court overruled the demurrer. They now insist that attorney fees incurred in the successful defense of a replevin suit, can not be recovered in a suit on the replevin bond. This precise question has never been passed upon by our Supreme Court so far as we are ad-

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vised. It has been repeatedly held by that court, however, that such items of damage are recoverable in suits on attachment bonds. The condition in a replevin bond for the payment of damages for the wrongful suing out of the writ is, under the present statute, the same as the condition in an attachment bond for the wrongful suing out of the writ. We are led, therefore, to the conclusion that fair and reasonable attorney fees expended by a successful defendant in a replevin suit, may subsequently be recovered as damages in an action of debt on the replevin bond. In this view we are sustained by authority. *Cobbey on Replevin*, Sec. 1358; *Hartz v. Wendell*, 26 Ill. App. 274; *Dalby v. Campbell*, 26 Ill. App. 502; *Seigel v. Hanchett*, 33 Ill. App. 634.

We can not consider the fifth error assigned and argued, that the court improperly admitted the bond in evidence, for the reason that no bill of exceptions has been preserved.

Martin DeWane v. Theodore Hansow.

1. PRACTICE—*Opening Statements on the Trial of Appeal Cases.*—On the trial of an action in the Circuit Court on appeal from a justice of the peace, the plaintiff is not bound by the opening statement made by his counsel in presenting the case to the jury.

2. SAME—*Office of an Opening Statement.*—The office of an opening statement is to enlighten the jury upon the issues involved so as to prepare their minds for the evidence, and the attorney making it should confine himself to the proposed proofs and make it sufficiently full for their understanding of the case. The plaintiff should not be confined in his evidence to the facts recited in the statement.

3. NECESSARIES—*The Parent Bound for.*—The parent is bound for necessities furnished his minor child when the child is living apart from him with his consent.

Memorandum.—Assumpsit for necessities, etc. In the Circuit Court of Boone County, on appeal from a justice of the peace; the Hon. JAMES GOGGIN, Judge, presiding. Verdict for defendant by direction of the court; appeal by plaintiff. Heard in this court at the December term, 1894. Reversed and remanded. Opinion filed January 24, 1895.

C. B. DEAN, attorney for appellant.

56	575
89	512
56	575
f189s	*143
56	575
108	*370

WM. L. PIERCE and R. W. WRIGHT, attorneys for appellee.

MR. JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This suit was commenced before a justice of the peace by appellant, to recover for the board, care and nursing of appellee's minor son, furnished him while confined at appellant's house with a broken leg.

Appellant recovered before the justice, but appellee appealed to the Circuit Court.

Upon the trial in the Circuit Court counsel for appellant, in his opening statement to the jury, stated in substance that the defendant's minor son, who had been in the employ of the plaintiff, had his leg broken by the falling of a horse which he was riding, making it necessary that he should have immediate care and attention; that he was taken to plaintiff's house, where he was boarded and nursed until his recovery; that on the day following the injury, plaintiff requested the defendant, who had consented to his minor son's employment by the plaintiff, to come and care for his son, which the defendant refused to do, stating that the county would have to care for him; that he then told the defendant that if the boy continued to remain at his house he should care for him and nurse him and look to the defendant for payment of the expense of doing so; that he, on other occasions afterward, while the boy was still under treatment at his house, requested the defendant to take him away and care for him, which defendant refused to do, and that this suit was to recover for the reasonable expenses for boarding, waiting upon and nursing of such son until the time of his recovery.

Appellant was introduced as a witness, and after stating how the accident occurred, said that he acquainted appellee with the matter the next morning and requested him to take his son away and care for him, which appellee refused to do, saying that he would have nothing to do with his son; that he cared for him twenty days and nursed him; but before his testimony was concluded, appellee moved to exclude all the testimony which had been given. The court sustained

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the motion, remarking that he would hear no more of it, that the case had been stated and the motion should be sustained. Appellant then offered to produce further testimony, which was refused. The court then directed a verdict by the jury for the defendant.

The court evidently was of the opinion that the plaintiff was bound by the opening statement made by his counsel to the jury, and that he did not state such a case as entitled him to a recovery against the defendant. Such a view puts the opening statement in an appeal from a justice of the peace upon the same footing of a declaration in an original common law case, and it is contended by appellee that if the statement does not show a cause of action, the court should direct a verdict for the defendant.

We are not inclined to take this view of the law. While the office of a jury statement is to enlighten the jury upon the issues involved, so as to prepare their minds for the evidence to be heard, and the attorney making it should confine himself to the proposed proofs and make it sufficiently full for their understanding of the case, the plaintiff is not confined to the facts recited in the statement. He would be entitled to introduce evidence and prove a case if no opening statement at all had been made.

But the statement made in this case does show a cause of action.

The parent is bound for necessities furnished his minor child, if the parent refuses to furnish them when the child is living apart from the parent with his consent. *McMillan v. Lee*, 78 Ill. 443; *Clark v. Gotts*, 1 App. 454; *Porter v. Powell*, 79 Iowa, 151. Reversed and remanded.

Chicago and Great Western Railway Company v. Patrick Hogan.

1. *TENDER—Questions for the Jury Under Plea of.*—Where a plea of tender of damages presents the only issue in a case, the only question for the jury to determine is the amount of damages to be awarded.

Memorandum.—Action for damages caused by fire. Appeal from the County Court of Ogle County; the Hon. JOHN D. CAMPBELL, Judge, presiding. Heard in this court at the December term, 1894, and affirmed. Opinion filed January 24, 1895.

STEPHENS & EARLEY and D. W. BAXTER, attorneys for appellant.

J. C. SEYSTER, attorney for appellee.

PER CURIAM.

Appellee is the owner of an improved farm of 440 acres in Ogle county, through which the railroad of appellant passes. On the 17th of September, 1893, sparks from a locomotive running on the road set fire to the grass on the meadow lands of appellee and the fire burned over seventy acres of land, destroying three large stacks of hay and burned a considerable amount of fencing. To recover damages therefor this suit was brought. A trial by jury resulted in a verdict and judgment for \$750.

After suit was commenced, appellant tendered to appellee \$479.45 and costs to date, which was refused. The tender was continued by leaving the money with the clerk of the court. Before trial a plea of tender was filed and the general issue withdrawn. The only question for the jury to determine was as to the amount of damages.

The proofs did not justify the amount of damages allowed by the jury. Appellee, however, has filed in this court a remittitur for \$150, and we think the amount of \$600 a fair estimate of the damages sustained.

Judgment affirmed as to \$600 and judgment against appellee for the costs of this court.

56	578
68	150
68	152

Atchison, Topeka & Santa Fe Railroad Company v. John H. Alsdorf, Administrator of the Estate of Eugene C. Judd.

1. **NEGLIGENCE**—*Coupling Cars in the Night Time.*—The natural perils of a brakeman's duties in coupling cars dictate the exercise of prudence and caution in going between cars when he does so in the day-

A., T. & S. F. R. R. Co. v. Alsdorf.

time and after giving proper signals to the engineer; but to do so in the night without any warning or signal to the engineer is sheer recklessness.

Memorandum.—Action for personal injuries. In the Circuit Court of Grundy County; the Hon. DORRANCE DIBELL, Judge, presiding; declaration in case; plea of not guilty; trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the December term, 1894. Reversed and remanded. Opinion filed January 24, 1894.

S. C. SROUGH, attorney for appellant.

E. L. CLOVER, attorney for appellee.

MR. JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This suit to recover damages on account of the death of Eugene C. Judd, who was killed while in the employ of appellant as a brakeman, was before this court on appeal at the December term, 1892. 47 Ill. App. 200.

The circumstances under which Judd lost his life are set forth in the opinion then filed, and as the evidence heard upon the trial had after the case was remanded is substantially the same as that heard upon the first trial, except that on this trial it was shown that the deceased was on the same side of the train as the rear brakeman, it is not necessary to repeat them.

Upon the last trial appellee recovered a judgment for \$3,000, and from it appellant prosecutes this appeal.

Errors of the court in admitting improper testimony and in improperly instructing the jury are alleged, but we see nothing wrong with the rulings of the court in passing upon objections to evidence or instructions. The chief contention is that the verdict is against the evidence, and to that this opinion will be confined.

The negligence charged against appellant was in failing to have the spaces between the ties on the side track where Judd met his death filled in with dirt, so as to make the place smooth and safe for brakemen to stand on in coupling and uncoupling cars, and the use of old rails from the sides of which projected iron slivers, making it dangerous for brakemen to perform their duties.

It devolved upon appellee to show not only the defective condition of the track and rails mentioned, but that those conditions or some one of them, were productive of the accident. Judd was run over and killed by getting between two of the freight cars on the side track which the engine had gone up to take out. No one saw him enter between the cars and it is not known why he went there. He was found crushed and dead under the car. A proper inference from the proof is that he was killed by the wheels of the car when propelled violently against them by the engine, caboose and coal car. But whether he caught in an iron sliver or a rail and was tripped to the ground, stumbled over a projecting tie, or was knocked to the ground by the violence with which the car was propelled against him, is mere conjecture. There was evidence of the finding next morning of a small shred of cloth in a sliver near to where Judd was found dead, and that a piece had been torn from his right pants leg; but it was not shown that the shred had formed any part of the pants or was of the same cloth.

A careful examination of the evidence leads us to the conclusion that the death of Judd is due to his own negligence. The movements of the engine, at the time, were being controlled by the rear brakeman, Beard. Judd left the engine when on the main track opposite the way car, and it passed on east to the passing track switch. Beard turned this switch to let it in for the caboose and coal car, and from then until the accident controlled the movements of the engine. The night was dark. To go between the cars without any notice or signal to the engineer under the circumstances was, upon the part of Judd, sheer recklessness. The natural perils of a brakeman's duties in coupling cars dictates the exercise of prudence and caution in going between cars, when he does so in daylight and after giving proper signals to the engineer. But to do so in the night time without any warning or signal to the engineer, and at a time when the engineer is following the signals of another brakeman, falls far short of that exercise of care for one's own safety which the law requires.

The judgment is reversed and the cause remanded.

Amasa Hutchins, Mayor, etc., v. Edward B. Heffran.

56	581
100a	550
56	581
76	653

1. **CITIES AND VILLAGES—Power of the Mayor to Remove Officers.**—The power to remove any officer appointed by him is given to the mayor of a city under Section 7, Article 2, Chapter 24, Revised Statutes, and he may exercise that power whenever he is of the opinion that the interest of the city requires it.

2. **SAME—Effect of Removal, etc.**—Whenever the mayor of a city, acting under Section 7, Article 2, Chapter 24, Revised Statutes, exercises his power of removal, the officer removed ceases to have any right to discharge the functions of the office. He does not continue in office until the council determine whether the action of the mayor is supported by sufficient reasons.

3. **SAME—Power of a Court of Equity to Review the Mayor's Act.**—The statute gives the mayor of a city the power to remove an officer appointed by him, and it is not in the jurisdiction of a court of equity to inquire whether the power has been exercised in a formal manner or whether the action is supported by sufficient reason.

4. **COURTS OF EQUITY—No Power to Determine Controversy Between the Mayor and Council of Cities.**—A court of equity is not a proper tribunal for determining disputed questions between the mayor and the council of a city concerning the appointment and removal of officers, or the rights of an appointed officer to the office which he claims.

5. **SAME—No Power to Determine Political Rights.**—A court of equity is conversant only with questions of property and the maintenance of civil rights. It has no jurisdiction to interfere with the public duties of any of the departments of the government.

Memorandum.—In equity. Bill for injunction. In the Circuit Court of Winnebago County; the Hon. JOHN D. CRABTREE, Judge, presiding; decree for complainant; appeal by defendant. Heard in this court at the December term, 1894. Reversed and remanded. Opinion filed January 24, 1895.

APPELLANT'S BRIEF, GARVER & FISHER, ATTORNEYS.

The mayor may remove any appointed officer, on any formal charge, whenever he shall be of the opinion that the interests of the city demand such removal, but he shall report the reasons for such removal to the council at a meeting to be held not less than five, nor more than ten, days after such removal. If the council, by a two-thirds vote of all its members, disapprove of such removal, such officer

shall thereupon be restored to the office from which he was so removed, but he shall enter into new bonds and take a new oath of office. Art. 2, Sec. 21, Chap. 24, p. 456, Vol. 1, Starr & Curtis.

This is purely a political subject. The subject-matter of the jurisdiction of the court of chancery is civil property. "Injury to property, actual or prospective, is the foundation on which jurisdiction rests." "The court has no jurisdiction in matters merely criminal or merely immoral which do not affect any right to property." *Sheridan et al. v. Colvin et al.*, 78 Ill. 247.

A court of equity is not a proper tribunal for determining disputed questions concerning the appointment of city officers, or their right to hold office, such questions being purely of a legal nature. *Ibid.*

A court of equity has no jurisdiction to entertain a bill to enjoin the mayor and aldermen from removing a party from an office and from preventing the party from discharging his duties after removal by them, as the party's remedy at law is complete. *Delahanty v. Warner et al.*, 75 Ill. 185.

It is conversant only with questions of property, and the maintenance of civil rights. It has no jurisdiction to interfere to aid a party in the violation of a public law, to overrule the policy of the State, or interfere with the public duties of any of the departments of government. *City of Chicago et al. v. Wright*, 69 Ill. 326.

A grant of power to the governor to remove an officer for a specified cause, implies authority to decide as to the existence of the cause. *State v. Dougherty*, 25 La Ann. 119.

APPELLEE'S BRIEF, N. C. WARNER AND A. H. FROST,
ATTORNEYS.

Appellee contended that the fire marshal, duly appointed and qualified, in the actual possession and enjoyment of a lucrative office, could successfully invoke the aid of a court of chancery to prevent an unauthorized assault upon his possession, and in support of this contention cited *Brady v.*

Hutchins v. Heffran.

Sweetland, 13 Kan. 41; Ry. Co. v. Ry. Co., 36 La. Ann. 561; Ryan v. Brown, 18 Mich. 212; Meachem's Public Offices and Officers, Sections 994, 995 and 997; Osborn v. Bank of U. S., 9 Wheat. 738; Cooper v. Alden, Harr. Chy. 72; Brown v. Gardner, Harr. Chy. 291; Wheeler v. Board of Fire Engineers of New Orleans (La. Ann.), 15 So. Rep. 179; Armitage v. Fisher, 26 N. Y. Sup. 167; 3 Pom. Eq. Jur., Sec. 1357, p. 2091; Mayer v. Stone Cutters' Assn., 47 N. J. Eq. 528; 2 Story's Eq. Jur. (13th Ed.), Secs. 927, 928, p. 233; 2 Story's Eq. Jur., Secs. 928, 933; Reid v. Moulton, 51 Ala. 263; Ex parte Scott, 47 Ala. 411; High on Injunctions (3d Ed.), Secs. 1212, 1315; Hilliard on Injunctions (3d Ed.), Sec. 1, p. 486; Kerr et al. v. Krego et al., 47 Pa. St. 295.

MR. JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This appeal is prosecuted from a decree of the Circuit Court enjoining appellant as mayor of the city of Rockford from forcibly expelling appellee from the office of fire marshal of the city and from any interference with him in his functions and powers as chief of the fire department and from proceeding in any manner against him with respect to said office otherwise than upon formal charges as authorized by statute.

Among the appointive offices of the city is that of fire marshal, the head of the fire department, to be appointed by the mayor with the consent of the city council. The appointee holds the office for one year, unless removed, and until his successor is appointed and qualified. Appellee was appointed to this office in the spring of 1891, and was filling it at the time appellant was elected mayor in the spring of 1893. After being installed into his office as mayor, appellant nominated one Stephen T. Julian as fire marshal and sent his name to the city council for confirmation. Appellee was at the time an applicant for reappointment. The appointment of Julian was neither confirmed nor rejected, but was, on motion in the city council, tabled by a vote of nine to five, and was not acted upon afterward. Appellee continued to exercise the functions of the office

for a year longer. Appellant then again nominated Julian, but the city council rejected it by a vote of eleven to three. He then nominated Frank E. Peats, which nomination was rejected by a like vote. He then nominated Frank E. Thomas, but he was rejected by like vote.

It is quite evident from the testimony in the record that the wrangle between the mayor and the city council had waxed warm, and that a majority of that body were determined that appellee should be continued as fire marshal, whether acceptable to the mayor or not, while the mayor was as fully determined that he should not be continued. Accordingly, on the 7th of May, 1894, appellant removed appellee as fire marshal, directed him to vacate the office and turn over the property of the department in his possession to a subordinate officer, and threatened to forcibly eject him if he refused to comply. On the next day this bill for an injunction was presented to the master in chancery, who entered an order temporarily restraining appellant from any further action. On a motion to dissolve made before the judge in vacation, the temporary injunction was so modified as to restrain appellant from all interference with appellee in the office until he should be lawfully removed, or his successor appointed and qualified, which injunction remained in effect until the decree for perpetual injunction was rendered on the hearing.

Because of the refusal of the city council to confirm nominations made by appellant, the restraining orders entered in vacation, and the final decree, appellee has been continued in office nearly two years beyond the expiration of his term.

We waive a discussion of the several points urged by appellant that the decree does not conform to the bill, that appellee is a mere *de facto* officer who can claim nothing for himself in equity, and that the surety on his bond is not liable beyond the time limited in his commission, and consider at once the two questions which we regard as sufficiently decisive of the case.

1. Has the mayor of a city the power to remove an ap-

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pointed officer, and can such officer, after notice of such removal, continue to hold the office until the action of the mayor is passed upon by the city council?

2. Has a court of chancery jurisdiction to interfere with a mayor in the exercise of a statutory power to remove?

Sec. 7, Art. 2, Chap. 24 R. S., reads: "The mayor shall have power to remove any officer appointed by him on any formal charge, whenever he shall be of the opinion that the interests of the city demand such removal, but he shall report the reason for such removal to the council at a meeting to be held not less than five days, nor more than ten days, after such removal; and if the mayor shall fail or refuse to file with the city clerk a statement of the reasons for such removal, or if the council shall, by a two-thirds vote of all its members, authorized by law to be elected by yeas and nays to be entered upon the record, disapprove of such removal, such officer shall thereupon become restored to the office from which he was so removed; but he shall give new bonds and take a new oath of office. No officer shall be removed a second time for the same offense."

The power to remove is clearly given by this section, and the mayor may exercise that power whenever he is of the opinion that the interests of the city demand it. Whenever he does exercise it, the officer removed ceases to have any right to discharge the functions of the office. It is not within the contemplation of the statute that he should continue until the city council determine whether the action of the mayor is supported by sufficient reasons. That he is out of the office with no right to exercise any of the functions, is clearly indicated by the provisions for his restoration in the event of the mayor failing to report this reason for such removal or in the city council deciding by a two-thirds vote that the mayor had not sufficient reason for removing, and by the further provision that when restored he shall give a new bond and take a new oath of office. It is idle to contend that the office is not vacant when the statute provides that if the council shall disapprove of the mayor's action he shall "thereupon become restored to the office from which he was removed."

It is contended that inasmuch as the statute provides for the removal upon formal charge, all other modes of removal are excluded, and that appellee is entitled to hold the office because the mayor, at the time he undertook to exercise the power, made no formal charge against him. It is further contended that all removals must be for reasonable cause and not upon mere arbitrary exercise of discretion; that specific charges must be made and the accused be given an opportunity to be heard. We will not undertake to state what would be necessary to constitute a formal charge or what would be a reasonable cause for removal.

It is sufficient for us to say that the statute gives the mayor the power to remove, and that it is not the business of a court of equity to inquire whether the power has been exercised in a formal manner or whether the action of the mayor is supported by sufficient reason.

A court of equity is not a proper tribunal for determining disputed questions between the mayor and the council of a city concerning the appointment and removal of officers, or the rights of an appointed officer to an office which he claims. It is conversant only with questions of property and the maintenance of civil rights. It has no jurisdiction to interfere with the public duties of any of the departments of government. *City of Chicago et al. v. Wright*, 69 Ill. 326; *Delehanty v. Warner et al.*, 75 Ill. 185; *Sheridan et al. v. Cohen et al.*, 78 Ill. 247.

While the contests in the above cited cases were not exactly the same as the one in this case, the opinions clearly indicate the views of our Supreme Court upon the principles involved and that we are in harmony with them.

We have carefully examined the authorities cited by appellee. The only one that supports his contention is that of *Brady v. Sweetland*, 13 Kan. 41, and the reasoning there employed does not harmonize with the views of our Supreme Court.

The decree will be reversed with directions to the Circuit Court to dissolve the injunction and dismiss the bill for want of equity.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

THIRD DISTRICT—NOVEMBER TERM, 1894.

The Coffeen Coal and Copper Co. v. W. S. Barry.

56	587
56	591
56	587
114	4552

1. **CONTINUANCES—*Copy of Account Sued on.***—Where a copy of an account filed with the declaration was not such an itemized statement as the law requires, and the defendant moved for and obtained a properly itemized copy of the account, it was held that a motion for a continuance on the ground that a sufficient copy of the account was not filed ten days before the first day of the term was properly overruled.

2. **SAME—*Amended Copy of the Account Sued on—Surprise.***—Where the copy of the account sued on filed with the declaration is not sufficient, and the plaintiff upon motion of the defendant is required to and does file one which is sufficient, the fact that it was not filed ten days before the commencement of the term is not sufficient cause for a continuance unless the defendant shows that he was taken by surprise by the demand as set forth in detail.

3. **SURETY—*Suit Against Principal for Money Paid—Attorney's fees.***—When a surety upon a promissory note containing a provision for the payment of attorney fees in case the note is collected by suit has paid a sum as such fees, he will be allowed to recover the amount so paid by him from his principal by showing that it was such as is usually charged by members of the bar for such services.

4. **PRACTICE—*General Objections.***—It is not permissible to so frame an objection that it will serve to save an exception to the action of the court of review and yet conceal the real complaint from the trial court.

Memorandum.—*Assumpsit.* In the Circuit Court of Montgomery County; the Hon. ROBERT B. SHIRLEY, Judge, presiding. Common counts and plea of the general issue; trial by the court; judgment for plaintiff; error by defendant. Heard in this court at the November term, 1894, and affirmed. Opinion filed February 11, 1895.

STATEMENT OF THE CASE.

The appellee and sixteen others, as sureties, indorsed a note for the sum of \$4,000, executed by the appellant company as principal and payable to the Montgomery Loan and Trust Company.

The appellant company failed to pay its note and the Loan and Trust Company instituted suit against it, and the appellee and the other sureties recovered judgment in the sum of \$4,061.21 against it and them. The note contained an agreement binding the makers thereof to pay a reasonable attorney fee if the note should be collected by suit. This clause was so framed that the fee for the plaintiff's attorney could not be included in the judgment entered upon the note. Execution was issued upon the judgment and delivered to the sheriff. The attorney for the plaintiff in the action which resulted in the judgment (who is also one of the attorneys for the appellant company in this court), prepared and delivered to the sheriff a letter addressed to the defendants in the judgment advising them that a clause in the note provided for the payment by them of a reasonable attorney fee which was not included in the judgment, and unless they would pay the fee to the sheriff when he called upon them with the execution, that suit to recover it would at once be instituted, and further that the sum of \$200 would be accepted in full of such attorney's fees.

The appellee paid to the sheriff the sum of \$258.70 which was one seventeenth part of the judgment and also one seventeenth part of the sum of \$200 demanded as the fee of an attorney, provided for by the note but not included in the judgment. The suit at bar was an action of assumpsit brought by the appellee against the appellant company to recover the said sum so paid as its surety. Judgment in the trial court therefor, from which the appellant company prosecute this appeal.

LANE & COOPER and JAMES M. TRUITT, attorneys for plaintiff in error.

AMOS MILLER and C. W. BLISS, attorneys for defendant in error.

MR. JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

It is first assigned, as for error, that the court overruled the motion of the appellant company for a continuance.

The ground of the motion was the alleged failure of the appellee to file a copy of the account sued on ten days before the beginning of the term of court. An account was attached to and filed with the declaration in ample time, but it was not such a detailed and itemized statement of the plaintiff's claim as we think the appellant was entitled to demand. We regard it, however, as so far an attempt, in good faith, to comply with the requirement of the "Practice Act" as to furnish the basis for amendment whereby a continuance might be avoided. A cross-motion for leave to amend was entered but subsequently withdrawn, whereupon the appellant, instead of abiding by the exception to the action of the court in overruling its motion for a continuance, moved the court to require the appellee to file a bill of particulars. The court granted this motion and the appellee filed a detailed statement of his claim. The appellant then renewed its motion to continue the case on the ground that the bill of particulars or account had not been filed ten days before the beginning of the term. This the court overruled and the appellant saved the exception thereto. The purpose of the requirement of the "Practice Act" was fully subserved by the bill of particulars, which the court at the request of the appellant company required the appellee to place on file, unless it was taken by surprise by the demand as set forth in detail. It made no complaint of that character, but on the contrary, filed a plea of the general issue and proceeded to the trial upon its merits.

The action of the appellant company in asking the aid of the court to force the appellee to file a proper account and in thereafter pleading to the merits and entering upon the trial of the case is consistent only with the view that it had abandoned its motion for a continuance of the cause

and its exception to the action of the court thereon and elected to submit the case for determination at that term. It can not be allowed in this court to shift its position. It is next complained that the evidence was insufficient to support the judgment in this, that it was not proven that the amount paid for the fees of the attorney was reasonable. The proof upon the point was that the appellee paid a sum charged and demanded by the attorney and counselor at law who rendered the service. When it is necessary to establish the value of the services of an attorney a proper inquiry is what sum is usually charged by members of the bar for like services. *Reynolds v. McMillan*, 63 Ill. 46. The evidence produced was pertinent to this inquiry. It tended, however slightly, to show that the amount paid was such as attorneys charged for such services.

No specific objection to its admissibility was preferred and no proof was offered tending to overcome it. A general objection was entered, but it does not appear from the record that the precise point sought to be urged in this court was disclosed in the lower court or ruled upon by the judge thereof either when passing upon the objection or the motion for a new trial. Had proper objection been made so that the court and counsel could have known the ground thereof, no doubt such action would have been taken as to have removed all just cause of complaint. It is not permissible to so frame an objection that it will serve to save an exception for the action of a court of review and yet conceal the real complaint from the trial court. It is not contended and was not in the trial court that the amount was unreasonable. The judgment is right upon the merits and there is no error in the record demanding its reversal. It is affirmed.

Coffeen Coal & Copper Co. v. Kaubrick.

Coffeen Coal & Copper Co. v. Jacob Kaubrick.

Same v. William Kaubrick.

Same v. James W. Lewis.

Same v. J. A. Hanner, use, etc.

Same v. J. C. Brown.

1. *CASES—Governed, etc.*—Coffeen Coal & Copper Co. v. Barry, *supra*, governs these cases.

Memorandum.—Appeal from the Circuit Court of Montgomery County; the Hon. ROBERT B. SHIRLEY, Judge, presiding. Affirmed. Opinion filed February 11, 1895.

LANE & COOPER and JAMES M. TRUITT, attorneys for plaintiff in error.

AMOS MILLER and C. W. BLISS, attorneys for defendants in error.

PER CURIAM.

The points, both of law and fact, in each of these cases, are the same as were presented in the case of the Coffeen Coal & Copper Company v. Barry, decided in this court at this term. For the reasons appearing in the opinion filed in that case, the judgments in each of the foregoing cases is affirmed.

Robert C. Wilson and Lemuel D. Lane v. William A. Kelly.

1. *QUESTIONS OF FACT FOR THE JURY—VERDICTS FINAL.*—Where, in a case, the entire proof considered, warrants the verdict, the court can not properly interfere if the jury have been properly instructed.

Memorandum.—Appeal from the Circuit Court of Vermilion County;

the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the November term, 1894, and affirmed. Opinion filed February 11, 1895.

S. G. WILSON and SALMANS & DRAPER, attorneys for appellants.

LAWRENCE & LAWRENCE, attorneys for appellee.

MR. PRESIDING JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This case was here at a former term (52 Ill. App. 124), and was then reversed on account of error in the instructions.

Another trial has resulted in a verdict for the plaintiff for \$800, and the record is again brought here by the defendants.

The facts need not be restated, though it may be noticed that the plaintiff's case is somewhat strengthened by proof tending to show that the dump was in bad condition before, and that defendants, through their employe, Lennox, had notice of it; and that the admissions of the defendant Lane, as to his knowledge that the dump was out of order, seem, by this record, to be quite well established, if the witnesses thereto are credible, though denied by him. The entire proof considered, we are not able to say that the verdict is without warrant, and therefore, unless the objections urged to the ruling of the court on the instructions are valid, we can not properly interfere.

The second instruction given for plaintiff is criticised because there was no evidence upon which to predicate it.

We think there is no such want of evidence, either as to the defective condition of the dump, or the knowledge of at least one of the defendants, Kane, and the employe, Lennox, as to render the instruction objectionable. The third instruction does not seem to us to be misleading, as urged, when the evidence, upon the point referred to, is considered.

The objection to the fourth, that the admissions of Lane

Johnson v. Cunningham.

are thereby made conclusive of the case, is, as we think, untenable. The construction suggested is strained, and it is not likely the jury were misled. It merely announced the proposition that Lane's admission was evidence against the firm, and, when applied to the evidence, it could hardly have been misunderstood.

At the instance of the defendants the court instructed quite fully as to the elements and conditions necessary to recovery, and we find no complaint urged in that respect.

The brief of counsel for appellants deals very largely with the evidence, and is based upon the theory "that the plaintiff was injured through his own lack of care, and by some unforeseen accident, the cause of which was not known, or capable of being known, to the defendants," as is stated, by way of summary, near the close.

This statement discloses what was the real question in the case. No doubt, from the course taken by the proof, and from the instructions, the attention of the jury was mainly devoted to this point, and we can see nothing to indicate that the cause for the defendant was unjustly affected by the action of the court.

We find no error of substance, and are of opinion the judgment should be affirmed.

J. S. Johnson v. James Cunningham and Thomas Williams, Executors of Thomas Hoopes, Deceased, and John Watts.

1. **DRAINS AND DITCHES—Constructed by Mutual Consent.**—The act of the General Assembly approved June 4, 1889, entitled, "An act declaring legal drains heretofore or hereafter constructed by mutual license, consent or agreement, by adjacent or adjoining owners of land, and to limit the time within which such license or agreement heretofore granted may be withdrawn," was intended to enlarge the rights of drainage as between adjoining landholders, and to protect drains continuous in their character and purpose for the mutual benefit of the lands affected wherever they had been constructed by license or consent,

though without written authority. Drains not within the purview of the act are not protected by it.

2. *SAME—Obstructing—Burden of Proof.*—In an action for obstructing a ditch or drain not coming within the provisions of the act of June 4, 1889, before the plaintiff can recover, he must show that the ditch or drain obstructed was along or part of a natural watercourse.

3. *WITNESSES—Adverse Party Defending as an Executor.*—Sec. 2, Chap. 51, R. S., entitled, "Evidence and Depositions," prohibits the testimony of a party in his own behalf when any adverse party sues or defends as an executor of a deceased person, and is a limitation upon the preceding section which removes the disqualification of a party litigant to testify in his own behalf.

4. *PARTIES—Tort Feasors, at Common Law and Under the Statute.*—At common law the death of a *tort feasor* abated the action as to him. Under the statute the action may survive against the personal representative, but he can not be joined with a surviving *tort feasor*, for one is chargeable *de bonis testatoris* only, and the other *de bonis propriis*. There can be no judgment against them jointly.

5. *SAME—Misjoinder, Objection, When to be Made.*—The objection that there is a misjoinder of parties may be made by demurrer, or in arrest of judgment, or upon error.

6. *EVIDENCE—Exclusion of Proper, Not Always Reversible Error.*—The exclusion of competent evidence which, had it been admitted, could have availed the party offering it nothing, is not such error as will justify reversal.

Memorandum.—Action for obstructing a drain. In the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Declaration in case; plea, not guilty; trial by jury; verdict and judgment for defendants; appeal by plaintiff. Heard in this court at the November term, 1894, and affirmed. Opinion filed February 11, 1895.

SALMANS & DRAPER, attorneys for appellant.

APPELLEES' BRIEF, ALLEN & CHAMBERLIN AND H. M. STEELY,
ATTORNEYS.

The right to flood the land of another, whether from the dripping off the roof of a building or otherwise, is an interest in the land, and a parol license or agreement giving such right is within the statute of frauds, and void. Chapter 59, Sec. 2, R. S.

Such a license is revocable at any time. *Tanner v. Valentine*, 75 Ill. 624, and cases cited.

Johnson v. Cunningham.

MR. PRESIDING JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This was an action on the case by Johnson against Cunningham & Williams, executors of Hoopes, deceased, and John Watts. The declaration alleged that the deceased, Hoopes, and the defendant, Watts, had, during the lifetime of said Hoopes, negligently and carelessly filled a certain ditch, theretofore opened by the plaintiff across the land of said Hoopes, by the consent and permission of the then owner of the land, who afterward sold to Hoopes, which said ditch was constructed along a natural watercourse, and being connected with a ditch or drain on the plaintiff's land, was useful to the plaintiff in draining his land, and that by reason of said action of said Hoopes and said defendant, Watts, the plaintiff, had been damaged, etc. There was a plea of not guilty, and upon a trial by jury, the verdict was for the defendant. A motion for a new trial interposed by the plaintiff was overruled and judgment was entered against the plaintiff for cost, from which the present appeal is prosecuted.

The appellant contends that according to the preponderance of proof, he maintained the substantial averments of his declaration. He does not contend that the ditch referred to was a natural outlet, but claiming that while it is immaterial whether it was a natural or an artificial outlet, it was constructed in the general direction of, or along, a natural outlet. He does not, in terms, rely upon the act of June 4, 1889, as authorizing him to insist upon the continuance of the ditch. That act was intended to enlarge the rights of drainage as between adjoining land holders and to protect drains continuous in their character and purpose for the mutual benefit of the lands affected whenever they had been constructed by license or consent, though without written authority. *Wilson v. Bondurant*, 42 Ill. App. 603; S. C., 142 Ill. 645. We think it very doubtful from the proof whether this drain was within the purview of that act.

It hardly attained the character of a continuous drain for mutual benefit, and was rather a ditch made on the land of

Hoopes for the purpose of carrying away water accumulating on the land of the plaintiff, and was merely an artificial outlet for such accumulation, and of no mutual benefit to the lands of plaintiff and Hoopes.

The plaintiff evidently so regarded it, for he distinctly alleged in his declaration that it was along a natural watercourse. He did not attempt, by his averments, to bring himself within the provisions of the act of 1889. Had he done so the averment that it was a natural outlet might have been regarded as surplusage and proof thereof not indispensable to recovery.

In view of the averments of the declaration and of the state of the proof we are of opinion that the court properly instructed the jury that the plaintiff must prove that the ditch was along and a part of a natural watercourse, and properly refused instructions ignoring this requirement.

The question of fact upon this point was fairly for the jury, as was also the further question presented by the proof offered by defendants, tending to show that whatever was done by Hoopes and the defendant Watts was by the consent of the plaintiff, who undertook to find another outlet by a drain along his west line to a ditch in the highway.

Upon the trial the plaintiff was offered as a witness in his own behalf, and was objected to because the defendants, Cunningham and Williams, were sued in the capacity of executors of Hoopes, the deceased. It seems to have been understood that his proposed testimony related to matters occurring in the lifetime of Hoopes and on this ground his evidence was excluded. This ruling of the court is now assigned as error.

We have been referred to no adjudication by the Supreme Court upon this point and in our investigation have found only the case of *Eich v. Sievers*, 73 Ill. 194.

In that case the action was upon promissory notes, signed by Eich and Schureman, and the former having died pending the suit, his administrator was substituted, and the suit thereafter progressed against the administrator and the other maker. On the trial the plaintiff was permitted to

testify in his own behalf and error was assigned upon this ruling. The Supreme Court said in reference to the point, that the difficulty arose out of the fact that the administrator of the deceased maker was improperly joined with the surviving maker as a co-defendant, and that no error had been assigned upon the action of the trial court in permitting such joinder or in rendering a judgment jointly against the administrator and the surviving maker, and added that the evidence was competent against the surviving maker, and being admissible on that ground the court could not exclude it; that its effect, if injurious to a co-defendant, could be controlled by instructions, but that even if improperly admitted no harm was done, because the defense had been favored by the verdict as far as justified by the proof regardless of the plaintiff's testimony. So it may be said that the ruling as to the competency of the evidence was unnecessary in the view taken by the court of the whole case. The statute, Sec. 2, Ch. 5, prohibits the testimony of a party in his own behalf when any adverse party sues or defends as an executor of any deceased person. This provision is a limitation upon the preceding section which removes the disqualification of a party to be a witness for himself.

But for the intimation in *Eich v. Sievers*, *supra*, we should be inclined to hold that the plaintiff's testimony was properly excluded. Conceding, however, that there was error in its exclusion we are of opinion that the judgment should not be reversed on this account.

It has already been stated that the alleged cause of action was the tortious act of Hoopes and Watts, and the suit was brought against the latter and the personal representatives of Hoopes who had died.

At common law the death of Hoopes would have abated the action as to him, and though by our statute the action may survive against the personal representative, yet it must be clear that he can not be joined with a surviving tortfeasor, for the reason that one is chargeable *de bonis testatoris* only and the other *de bonis propriis*, and so there can be no judgment against them jointly.

The objection that the parties were misjoined may be made by demurrer or in arrest or on error.

It follows that the plaintiff could not recover against the defendants jointly for the cause alleged in the declaration, and therefore, as the pleadings were made up, the only valid judgment that the court could render was for the defendants.

Hence, the judgment should not be reversed because of the supposed error in excluding evidence. The judgment is affirmed.

Village of Germantown v. Henry Goodner.

1. PRACTICE IN APPELLATE COURT—*Improper Abstracts*.—When nothing is shown in the abstract upon which to base an objection, it will not be considered.

Memorandum.—Appeal from the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the November term, 1894, and affirmed. Opinion filed February 11, 1895.

MABIN & LORD, attorneys for appellant.

SALMANS & DRAPER, attorneys for appellee.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

Excepting so much of the bill of exceptions as sets forth the evidence, the abstract furnished is but an index to the record. It contains nothing whatever of the pleadings or instructions. From the argument for appellant we understand it was an action on the case against the village for injury to property of the plaintiff by raising the grade of the street in front of it about three feet, which is alleged to have injuriously affected the means of ingress and egress to and from it and impaired its market value. The property

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consisted of three lots, sixty by one hundred and twenty feet each, facing east on Martin street. His residence was on the north, another dwelling house on the south and a barn and carriage shed on the middle lot. Plaintiff estimated the value of the whole before the street was raised at \$1,800 to \$2,000, which the defense claimed was several hundred too high. Upon the question of the amount of damages sustained twenty witnesses were examined, of whom seven were called by plaintiff. Their estimates ranged from \$300 to \$800, the average being considerably above \$400, which was the amount found by the jury; while the defendants generally put it from nothing to a trifle, and one thought the street improvement rather enhanced its value.

The court, however, refused to set aside the verdict and gave the plaintiff judgment upon it.

It is complained that evidence of damage to the fences was improperly admitted, because no claim for such was made in the declaration, and also of overflow of water on the premises for the same reason. And it is further said that from a sympathetic jury, acting "under such instructions as numbers 2 and 3," a municipal corporation can have but little hope of justice. But where not a word purporting to be from the declaration or instructions appears either in the abstract or argument, we are not inclined to consider such objections.

No other point is presented except that the verdict is against the weight of the evidence; about which there is too much doubt to warrant our interference. Judgment affirmed.

Avery Planter Company v. J. L. & W. D. Rigg.

1. WARRANTY—*Questions of Fact.*—The question as to whether the fact that a threshing machine did not properly clean the grain and separate it from the chaff and straw, was attributable to its improper construction, or the failure of the person operating it to handle the machine as required by the warranty, is for the determination of the jury.

2. NOTICE—*Under a Contract of Warranty.*—If a person entitled to notice in a particular manner, under the terms of a contract of warranty, voluntarily accepts a different notice and acts upon it as being in compliance therewith, he will be held to have waived the literal compliance with the contract in giving notice.

Memorandum.—Assumpsit on a promissory note. In the Circuit Court of McDonough County; the Hon. CHARLES J. SCOFIELD, Judge, presiding. Trial by jury; verdict and judgment for defendant; appeal by plaintiff. Heard in this court at the November term, 1894, and affirmed. Opinion filed February 11, 1895.

HARRIS & FLACK and WHEAT & MELOAN, attorneys for appellant.

APPELLEES' BRIEF, NEECE & SON AND BAILY & HOLLY,
ATTORNEYS.

Where, in a written agreement of warranty on a threshing machine, it was stipulated that if within three days after it was set up and started it should not work as warranted, the buyer should at once discontinue its use and notify the seller in writing and wait for the seller to send a man to right it, and within that time an agent representing the company and authorized to make necessary repairs and changes, appears and undertakes the same, the required notice is waived. Mass. Loan & Trust Co. v. Welch, 47 Minn. 83; 49 N. W. Rep. 740; Sandwich Mfg. Co. v. Trindle (Iowa), 33 N. W. Rep. 79; Champion Machine Co. v. Martin (Kansas), 22 Pac. Rep. 417; C. Aultman & Co. v. Troudt (Neb.), 42 N. W. Rep. 1024; Havana Pressed Drill Co. v. Scurlock, 23 Ill. App. 426.

MR. JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

The appellant company sold to the appellees a separator, stacker, etc., for threshing grain, and delivered therewith its written warranty that the machinery, "with proper handling, after carefully observing and intelligently following our directions stenciled upon the machine and printed * * * will do as good work in threshing grain as any other machine in the United States." The appellees executed a note in part payment of the machinery. This was an action

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to recover upon the note. The defense was an alleged breach of the warranty in this, that the separator failed to separate the grain from the chaff and straw or to properly clean it. The defense was successfully urged in the trial court and the company appealed. We find that it was abundantly proven that the machinery did not properly clean the grain and separate it from the chaff and straw. The appellees insisted that the failure of the machinery to operate satisfactorily was attributable to the improper construction or arrangement of the fans and riddles. The appellant company urged that it resulted from the failure of the appellees to observe and follow the directions printed and stenciled upon the machine and to properly handle the machinery, as was required to be done by the express terms of the warranty. This contention presented an issue of fact for the jury to decide. The evidence bearing upon it though not free from conflict preponderated decidedly, as we think, in favor of the appellees. A breach of the warranty was thereby established. Counsel for the appellant company insist that the warranty by its express terms depended upon certain precedent conditions to be performed by the appellees, and that they wholly failed in the performance thereof, whereby the company became absolved from its obligation. The provisions of the warranty as to these alleged precedent conditions are as follows: "If the purchaser after so doing (*i. e.*, properly handling the machinery according to the direction pointed out or stenciled on the separator), after a trial of ten days, is unable to make the engine or separator, as the case may be, satisfy this warranty, a written notice by telegraph or by registered letter shall at once be given to the Avery Planter Co., at Peoria, Illinois, and also to the party from whom it was purchased, stating specifically wherein it fails to satisfy this warranty, and a reasonable time shall be given to said company to send a competent person to remedy the defect, if any there be (if it be of such a nature that a remedy can not be suggested by letter), and the undersigned hereby agrees to render necessary and friendly assistance. Failure

to make such trial, or to give such notices in any respect, or the use of the machinery above, or any part thereof, after the expiration of the time named in this warranty, shall be conclusive evidence of the fulfillment of the warranty on the part of said company, and that the machinery is satisfactory to the purchaser.

If the company shall, at the purchaser's request, render assistance of any kind in operating, or delivering, or starting said machinery, or any part thereof, or in remedying any defects either before or after said ten days trial, such assistance shall in no case be deemed a waiver of, or excuse for any failure of the purchaser to fully keep and perform the conditions of this warranty, and if said man sent shall not leave the machinery or any part thereof satisfying this warranty, the purchaser shall immediately give notice by telegraph or letter to Avery Planter Co., Peoria, Ill., stating specifically the failure complained of."

The appellant company urges that appellees did not give written notice by telegraph or registered letter to the Avery Planter Company at Peoria, Ill., stating specifically wherein the machinery failed to satisfy the warranty, and that as provided by the warranty the failure to give such notice conclusively bound the appellees to accept the machinery as satisfactory and estopped them from asserting that it failed to fulfill the warranty. It is true that notice was not given in literal compliance with the warranty. The evidence showed that the appellees in the afternoon of the first day that the separator was in use, verbally notified the local agent of the company that it would not do good work. He at once advised the company. It received the notice, accepted and acted upon it. It sent a representative at once to inspect the machinery and remedy any defect that might be found and make it do good work. He arrived on the third day after the machinery had been in use and seems to have diligently endeavored for the next two days thereafter to put the machine in proper running condition. While so engaged he applied to the company for and received from it specific directions for remedying

the defects. But even with the aid of such instructions he was unable to overcome the difficulty which seemed to be in the faulty construction or arrangement of the fans and riddles, and finally advised the appellant company that a skilled workman should be dispatched from its shop in Peoria. The company complied with his request, but the skill of this workman also proved unavailing, though he examined the machinery and changed the riddles and readjusted other parts of the separator on three or more different days. At his request the appellees tried for several days to use the machinery but it failed to do good work and they returned it to the agents of the company through whom they contracted for it. The company was entitled to demand notice as specified in the warranty, but it voluntarily accepted the notice that was given and treated and acted upon it as being in all respects in compliance therewith, and must be held to have waived literal compliance with the contract of warranty.

The appellees retained the possession of the machinery and used or attempted to use it for more than ten days. Counsel for appellant company contend that under the terms of the contract the retention of the machinery for more than ten days conclusively established that it fulfilled the requirement of the warranty. We do not so understand the contract. The proper construction is that the machinery should be tested or tried within ten days, and if the purchaser failed to test it within that time, or if he did test it and failed within that time to complain to the company that it was insufficient or defective, it should be conclusively presumed that it fully met and fulfilled the warranty. The appellees subjected the machinery to trial at once and on the first day discovered that it was not as warranted, and on that day gave notice thereof in a manner acceptable to the company, though not in literal compliance with the contract. No unfavorable presumption, therefore, arose against them. The ruling of the court in giving and refusing to give instructions were, we think, correct in every material respect. The judgment is right upon the merits. It will be affirmed.

Cleveland, C. C. & St. L. R. R. Co. v. J. H. Strong and T. J. Woodin, Partners as Strong & Woodin.

1. **VARIANCE—Pleadings and Proofs—Practice.**—Where the proof does not fit the pleadings, or there is better evidence of the contract sued upon, specific objection must be made at the trial; the point can not be raised for the first time in the Appellate Court.

2. **EVIDENCE—Copies of Exhibits.**—An objection to a writing that it is a copy must be made when it is offered in evidence; it comes too late in the Appellate Court.

3. **SAME—Of Charges and Expenses.**—Where a witness testified, in answer to a question as to what were the necessary expenses and charges for feeding hogs per day at the stock yards in Chicago, that the charges were \$1 per bushel for corn, etc., *it was held* that the objection that the reasonable value of the corn was not shown, is not tenable.

Memorandum.—Assumpsit. In the Circuit Court of Champaign County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Declaration on implied contract; plea, general issue; trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the November term, 1894, and affirmed. Opinion filed February 11, 1895.

GERE & PHILBRICK, attorney for appellant.

C. H. KIENZLE and THOMAS J. SMITH, attorneys for appellees.

MR. PRESIDING JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The appellees recovered a judgment against appellant for \$115 on account of delay in the transportation of three car loads of hogs, shipped at different times from St. Joseph to Indianapolis, whereby, as alleged, there was a loss in the shrinkage of the hogs as well as for extra expense in feeding and yardage, and as to two of the cars in the market price. The evidence in the case was all offered by the plaintiff, the defendant offering none and asking no instructions except that the verdict should be for defendant which the court refused. It is now objected that it appears by the

proof there was a written contract for shipment in each instance and that it was not offered in evidence; that the declaration being upon an implied promise or contract and the proof showing there was a special and express contract in writing, the plaintiffs can not recover upon the pleadings. Waiving the question as to whether the declaration counts upon a written and express contract or upon an unwritten and implied contract, it is sufficient to say we do not find that any specific objection was made to the proof offered by the plaintiffs on the ground of a variance, or that the contract was in writing and that the writing was the best evidence of what the contract was. The evidence on the point was in effect that when plaintiffs wished to make a shipment they would notify the agent and he would place a car at the stock chute; they would load the hogs, then go to the agent, have the hogs billed out and sign the contract; what that contract was did not appear, counsel on neither side asking any question as to its contents or purpose. Conceding that there is or might be any force in the objection, it comes too late.

If defendant thought the proof did not fit the declaration or that there was better evidence as to the contract or undertaking than that offered, the specific objection should have been made at the time, so that if deemed well taken it might have been obviated by amending the declaration or by offering the written contract, or by both. Having suffered the proof to go in without specific objection the point can not be heard now for the first time.

No authorities need be cited as to the now well settled rule and practice in this respect.

It is also objected that the plaintiffs were allowed to read the exhibits attached to a deposition which were copies of the bills rendered the plaintiffs by the commission men who sold the hogs. The witness testified that the duplicates which he attached to his deposition were correct copies of those sent to plaintiffs.

If the defendant wished to object because they were copies, and not the originals, a motion to that effect should have been made in apt time. It is too late now.

It is objected that the evidence shows that corn for feeding was charged by the commission men at \$1.00 per bushel without showing what was a reasonable price or that any was fed.

The witness, Graves, testified in answer to a question as to what were the necessary expenses and charges for feeding hogs per day at the stock yards that the charges were \$1.00 per bushel for corn and seven cents per head for yardage; that the estimated cost to carry hogs there was ten cents per hundred weight per day and that hogs were fed daily.

The objection is not tenable.

It is further objected that the whole evidence as to damages is presumptive merely; that there are no data upon which to base a definite estimate as to the loss sustained by the plaintiffs.

The evidence tends to show unnecessary delay, which is not denied; it tends to show that thereby the hogs would shrink four pounds a day each, and it tends to show as to two of the cars a loss in market value—as to one an advance.

It also shows the cost and expense of keeping the hogs at the stock yards while awaiting a sale. We see no want of certainty in these matters. There was a sufficient basis for a calculation of the damages and counsel have not favored us with their calculation showing that the verdict is for too much.

No objection is made to the instructions given for the plaintiffs. We find no error in the record, and the judgment will be affirmed.

**Bridget Powers, Administratrix of William Powers, v.
John Egelhoff et al.**

1. **WILLS**—*Vested and Contingent Legacies*.—A legacy, originally payable out of or chargeable upon real estate, will not vest until the whole condition upon which it is given, is complied with.

2. **LEGACIES**—*With Reference to the Circumstances of the Legatee and to the Condition of the Estate*.—If the payment of a legacy, charged

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upon land, is postponed with reference to the circumstances of the legatee, as in case of a legacy to A, to be paid at his arrival at the age of twenty-one, the charge fails unless A lives until the time of payment. But if the payment is postponed with reference to the situation or convenience of the estate, as if land is devised to A for life, with remainder to B, in fee, charged with a legacy to C, payable at the death of A, the legacy will vest instanter, and consequently if C die before the day of payment, his representatives will be entitled.

3. *SAME—Payable at a Future Day.*—A legacy made a charge upon lands, payable at a future day, does not vest till the time of payment; and if the legatee die in the meantime the legacy will lapse, and the estate, if devised, will go to the devisee freed from the charge of the legacy.

Memorandum.—In Equity. In the Circuit Court of Jersey County; the Hon. GEORGE W. HERDMAN, Judge, presiding. Bill to subject lands to the payment of a legacy; dismissed on demurrer; appeal by complainant. Heard in this court at the November term, 1894, and affirmed. Opinion filed February 11, 1895.

APPELLANT'S BRIEF, THOMAS F. FERNS, ATTORNEY.

A legacy, payable to A at the age of twenty-five years, goes to his administrator if he dies before he attains that age. *Ruffin v. Farmer*, 72 Ill. 615; *Kerlin's Lessee v. Bull*, 1 Dall. (U. S.) 175; *Hodgson v. Gemuiel*, 5 Rawle (Pa.) 99; *Newberry v. Hinnman*, 49 Conn. 130; *Furness v. Fox*, 1 Cush. (Mass.) 134; *Nelson v. Pomeroy*, 29 Atl. Rep. 534; 64 Conn. 257; *Shattuck v. Stedman*, 2 Pick. (Mass.) 468.

APPELLEES' BRIEF, CHAPMAN & VAUGHN, ATTORNEYS.

Appellees contended that the legacy lapsed on the death of the legatee. 1 *Roper on Legacies*, Ch. 11, Sec. 1, page 432; *Pawlett v. Pawlett*, 1 Vern. 321; *Smith v. Smith*, 2 Vern. 92; *Yates v. Phettiplace*, 2 Vern. 416; *Jennings v. Looks*, 2 Wms. 276; *Chandas v. Talbot*, 2 Wms. 276; *Prowse v. Abingdon*, 2 Atk. 482.

The rule is thus stated by Jarman (*Bigelow's Ed.*, star p. 791; *Am. Ed.* with *Randolph & Talcott's Notes*, Vol. 2, p. 450, being Ch. 25, Sec. 5): "A pecuniary legacy, whether charged on land or not, given to a person *in esse* simply, *i. e.*, without any postponement of payment, is of course, vested immediately on the testator's decease. In

regard to sums payable out of land *in futuro*, the old rule was, that, whether charged on the real estate primarily, or in aid of personalty they could not be raised out of the land if the devisee died before the time of payment; but this doctrine has undergone some modification, and the established distinction now is, that if the payment be postponed with reference to the circumstances of the devise of the money, as in the case of a legacy to 'A,' to be paid to him at his age of twenty-one years, the charge fails as formerly, unless the devisee lives to the time of payment; and that, too, though interest in the meantime be given for maintenance. But, on the other hand, if the postponement of payment have reference to the situation or convenience of the estate, as, if the land be devised to A for life, remainder to B in fee, charged with a legacy to C payable at the death of A, the legacy will vest instanter; and consequently if C die before the day of payment his representatives will be entitled; the raising of the money being evidently deferred until the decease of A in order that he may in the meantime enjoy the land free from the burden." 2 Redfield on Wills, Ch. 1, Sec. 15, Part 4, star p. 208; Theobald on Wills (3d Ed. 1885), 380, Ch. 33; 2 Woerner's Am. Law of Adm., 924; Wigram on Wills, 259, 260; McCartney v. Osburn et al., 118 Ill. 403; Williams v. Williams, 6 L. R., Ch. 782; Festing v. Allen, 5 Hare 572; Vowdry v. Geddes, 1 R. & M. 203; Bull v. Pritchard, 5 Hare 572; Taylor v. Gould, 10 Barb. 388; Burrows v. Sherm, 22 How. Pr. 169; Snow v. Snow, 49 Me. 159; Moore v. Smith, 9 Watts 403; Illinois Land and Loan Co. v. Bonner, 75 Ill. 315; Collier v. Slaughter, 20 Ala. 263; Butler v. Butler, 3 Barb. Ch. 304; Radcliff v. Bagshaw, 6 Tenn. 512; 2 Williams on Executors, 32 Am. Ed. 1049; Scofield et al. v. Olcott et al., 120 Ill. 362.

MR. PRESIDING JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This was a bill in chancery filed by the appellant to subject certain lands to the payment of three thousand dollars

as a charge thereon, pursuant to the will of Michael Powers, deceased. A demurrer to the bill was sustained, and a decree was entered dismissing the bill, from which the present appeal is prosecuted.

The testator died May 23, 1880, leaving him surviving his widow, the said Bridget Powers, and his three sons, John, James and William, the last named being then not quite fourteen years of age, and being the youngest of the family. The will provided as follows:

"First. I desire and direct that all my just debts be fully paid.

Second. It is my will and my desire that my wife, Bridget Powers, have full control and possession of all the real estate I may die possessed of, together with all my personal property, until my youngest child shall become twenty-one years old, and that she continue the business of farming and make a home for my children, and pay off a certain mortgage owing by me to John A. Shephard for the sum of four thousand dollars, and I hereby give her the power to sell and dispose of my personal property as she may see fit, in order to continue the business of farming.

Third. When my youngest child, William Powers, shall become twenty-one years old, it is my will and direction that my son, John Powers, shall have, in fee simple, the following described real estate, to wit: The southwest quarter of the southeast quarter and the east half of the southeast quarter of section No. twenty-one (21), and the west half of the southwest quarter of section No. twenty-two (22), and the undivided one-half of the southeast quarter of the northeast quarter, section No. thirty-three (33), all of the said land being in township No. eight (8) north, range No. twelve (12) west of the principal meridian in Jersey county, and State of Illinois.

Fourth. It is my will and direction when my son, William Powers, shall become twenty-one years old, that my wife, Bridget Powers, shall have the following described real estate, to wit: The east half of the northwest quarter, and the west half of the northeast quarter of section No.

twenty-eight (28), and the undivided one-half of the southeast quarter of the northeast quarter of section No. thirty-three (33), all of the said land being in township No. eight (8) north, range No. twelve (12) west of the third principal meridian, to have and to hold for and during the term of her natural life, and at her death the said land left to her for her life I give and bequeath to my son, James Powers, to have and to hold to him and his heirs forever.

Fifth. It is my will and direction when my son, William Powers, shall become twenty-five (25) years old that my son, John Powers, shall pay him the sum of three thousand (\$3,000) dollars, which I hereby make a charge against the land herein bequeathed him until the same is paid, the said sum not to draw any interest until my son, William Powers, becomes twenty-five (25) years old.

Sixth. It is my further will and direction that when my son, William Powers, becomes twenty-five years old, that my wife, Bridget Powers, and my son, James Powers, pay to him the sum of three thousand (\$3,000) dollars, which I hereby make a charge against the land herein bequeathed to them, the said sum not to draw any interest until my son, William Powers, becomes twenty-five years old.

Seventh. Should my son, William Powers, die before reaching the age of twenty-one years, it is my will and direction that my real estate descend at once as herein devised.

Eighth. It is my will and direction that when my son, William Powers, becomes twenty-one years old, that all the personal property then in the possession of my wife, Bridget Powers, be equally divided, share and share alike, between my sons, John Powers and James Powers, and my wife, Bridget Powers, and should he die before reaching the age of twenty-one years, the said personal property to be divided at once.

Ninth. It is my will and direction that my father, James Powers, have a home with my wife and children at the place I now reside during his life, and that they furnish him with all necessary comforts.

Tenth. Lastly, I do hereby nominate and appoint my wife, Bridget Powers, to be the executrix of this my last will and testament, hereby releasing her from giving any security on her bond as such executrix."

The bill alleged that the said Bridget Powers administered upon the estate pursuant to the will which was duly proved and recorded, and was finally discharged from further duty and liability in that behalf; that the said William Powers died intestate on the 14th of February, 1888, being then less than twenty-two years of age, leaving the said Bridget, his mother, and the said John and James, his brothers, his only heirs, and leaving as his only property the legacy of three thousand dollars provided for in the fifth clause of the will, no reference being made to that provided for in the sixth clause, and leaving valid debts unpaid; that the said Bridget was appointed his administrator; that the said John had, when by her requested, refused to pay the said sum so charged upon the land devised to him, and that he had conveyed said land to John Egelhoff, and that the said John was wholly insolvent. The prayer was that the said sum of three thousand dollars might be declared a lien upon the land devised to John, and that if not paid within a day to be fixed, etc., the land might be sold, etc.

The bill was filed July 31, 1894. The said William would have attained the age of twenty-five years on the 1st of July, 1891.

The question is whether the legacy to him was vested or contingent; whether, dying before he reached the age of twenty-five years, it passed to his personal representatives or whether it lapsed.

In Roper on Legacies, Vol. 1, p. 432, the rule is stated that a legacy originally payable out of or chargeable upon real estate will not vest until the whole condition upon which such legacy is given is complied with, as for example the attainment by the legatee of a designated age, though when the gift is to be paid or distributed *in futuro*, if the payment or distribution appears to be postponed merely for the convenience or ease of the property and not for reasons

personal to the legatee, *e. g.*, his age, the gift will vest *in presenti*.

Referring to the rule that a legacy charged on land will lapse upon the death of the legatee before the time fixed for payment, Jarman on Wills, 6th Ed., Vol. 1, page 806, remarks: "But this doctrine has undergone some modification, and the established distinction now is that if the payment be postponed with reference to the circumstances of the devisee of the money, as in case of legacy to A to be paid at his age of twenty-one years, the charge fails as formerly unless the devisee lives to the time of payment. But on the other hand if the postponement of payment appear to have reference to the situation or convenience of the estate, as if land be devised to A for life, remainder to B in fee charged with a legacy to C, payable at the death of A, the legacy will vest instantor, and consequently if C die before the day of payment his representatives will be entitled." The rule as thus modified has been approvingly referred to in *Scofield v. Olcott*, 120 Ill. 332, *Carper v. Crowl*, 149 Ill. 465, and in other cases in the Supreme Court of Illinois.

In *Redfield on Wills*, 2d Ed., Vol. 2, p. 208, it is said: "It seems entirely well settled that a mere charge on land, payable at a future day, does not vest till the time of payment, and if the legatee in the meantime decease, the legacy will lapse, and the estate, if devised, will go to the devisee freed from the charge. In other words, the lapse will inure for the benefit of the devisee."

A careful reading of all the provisions of the will has convinced us that the testator designed that the charge upon this land should be paid only upon the event of William attaining the age of twenty-five years.

The postponement was no doubt for reasons personal to the legatee and not for the ease or convenience of the estate.

We are therefore of opinion that the decree of the Circuit Court was correct, and it will be affirmed.

Charles W. Klemm v. W. J. Bishop et al.

1. **SHERIFFS—Action for a Failure to Levy an Execution—Defense.**—It is a good defense to an action on the bond of a sheriff for a failure to levy an execution that the property which the plaintiff in execution sought to have levied upon was not the property of the defendant in execution.

2. **SAME—Burden of Proof When Indemnity is Offered.**—Where, in an action upon a sheriff's bond for a failure to levy an execution upon certain property when indemnity is offered, the fact that the property sought to be levied upon was not the property of the defendant in the execution is relied upon as a defense, the burden of proving such defense is upon the defendant.

3. **SALES—Inadequate Consideration—Fraud.**—A sale of property can not be branded with fraud upon the sole ground that the consideration is inadequate.

4. **SAME—Of Partnership Assets by One Member of a Firm.**—A sale made by one partner of the assets of a firm in payment of a *bona fide* existing firm debt to a creditor, without notice, is valid, and a fair sale made in good faith to an existing *bona fide* creditor by one partner without the consent of the other, may, under circumstances of notice to the purchaser, be questioned by the non-assenting partner, but it is good as to all third persons.

5. **PREFERENCES—Right of Creditors to Seek.**—A creditor has the right to seek and obtain from his debtor a preference for the payment of his own debts to the exclusion of other creditors, without the imputation of fraud upon either party.

6. **SALE OF GOODS—Debtor to Creditor—Subsequent Promises.**—The fact that after the completion of an absolute, unconditional and valid sale and delivery of property, promises are made to the vendor to give him the proceeds of the sale of the property in excess of a certain amount, does not operate retroactively upon the sale and avoid it in favor of a creditor of the vendor.

Memorandum.—Debt. In the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding. Declaration on a sheriff's bond; plea that the goods and chattels were not the goods and chattels of the defendants in execution; jury waived and trial by court; judgment for defendants; appeal by plaintiff. Heard in this court at the November term, 1894, and affirmed. Opinion filed February 11, 1894.

STATEMENT OF THE CASE.

On the 12th day of January, 1894, Miss Annie Straley and Mrs. Hattie Schlagel executed a judgment note, as part-

ners, to the appellant. He caused a judgment to be entered thereon on the same day, in the County Court of McLean County, and procured an execution to issue thereon, which he placed in the hands of appellee, Bishop, then sheriff of that county. He desired that the sheriff should levy upon a stock of millinery goods, then in the possession of H. H. Newell, and who claimed to hold for himself and others, as owners. The sheriff refused to so levy the execution, and returned it "no property found," though the appellant tendered a sufficient bond of indemnity. This was an action in debt by appellant, upon the bond of the sheriff, for failing to levy the execution, whereby, as appellant alleged, he lost his debt. The defense was that the millinery goods did not belong to the defendants in the execution, and were not subject to the lien thereof. Whether Newell, and the others for whom he held possession, were the owners of the goods, as against the execution, was the principal question of fact. Newell claimed title to them by purchase from the judgment debtors, prior to the rendition of the judgment. The appellee contended that the goods were transferred to Newell by one only of the partners, for a grossly inadequate price, and with the secret agreement that they should be sold by Newell, and the proceeds above the purchase price, returned to the partners, and that the transaction was therefore fraudulent as to other creditors of the firm. The case was heard by the court without a jury. Issue found for the defendants below and judgment accordingly. Appeal by the plaintiff below.

APPELLANT'S BRIEF, POLLOCK & CONDON AND ROWELL, NEVILLE & LINDLEY, ATTORNEYS.

A conveyance of property, absolute on its face, but really intended only as a mortgage or security, is valid as between the parties; but the settled doctrine is that such a transfer of property is fraudulent, and void as to creditors. *Beidler v. Crane*, 135 Ill. 98.

Klemm v. Bishop.

APPELLEES' BRIEF, KERRICK & SPENCER AND W. K.
BRACKEN, ATTORNEYS.

The levy of the sheriff upon the property of B, by virtue of a writ against A, is a breach of his bond. *Jones v. The People*, 19 Ill. App. 300.

A sheriff, it is true, is bound to take property when it is pointed out to him by the plaintiff as belonging to the defendant, if it be his in fact, although it may be doubtful at the time whether it is so or not. If the plaintiff offers to indemnify him and if he should refuse in such case, after an indemnity is offered, to proceed against the property under an execution, and the plaintiff in a suit brought against the sheriff for not having so proceeded, should show clearly that the defendant in the execution was the owner of it at the time, the plaintiff would be entitled to recover, but not otherwise. So that the sheriff, if he refuses to take and sell the property, after being offered an indemnity by the plaintiff, takes the risk and responsibility on himself of showing that the property did not belong to the party named in the execution, and this is the most that can be claimed of him. *Commonwealth v. Wotmough*, 6 Whart. (U. S.) 140; *Commonwealth v. Van Dyke*, 57 Pa. St. 38.

It is only a grossly deficient consideration that will render a conveyance fraudulent as to creditors. *Monell v. Sherick*, 54 Ill. 261; *Holbert v. Graves*, 4 Mon. (Ky.) 583; *Hessing v. McCloskey*, 91 Ill. 487; *Lloyd v. Higbee*, 25 Ill. 673; *Haney v. Nugent*, 13 Wis. 315.

A person, though insolvent and embarrassed financially, may sell his property to pay his debts. *Wood v. Shaw*, 29 Ill. 444.

A debtor can sell his property for a fair price, even if he sells it with the avowed intention of defeating an honest claim, if no lien exists to forbid it. *Waddams v. Humphreys*, 22 Ill. 663.

A partnership may prefer creditors in all cases where an individual may do so. *Hanchett v. Gardner et al.*, 138 Ill. 571.

MR. JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

It is a good defense to an action on the bond of a sheriff for failure to levy an execution that the property which the plaintiffs in the execution sought to have levied upon was not the property of the defendant in the execution. 22 Amer. & Eng. Ency of Law, p. 544, and cases cited in note 3. When, as in the case at bar, indemnity is offered, the sheriff, in order to establish the defense, must prove that the property did not belong to the judgment debtor. 22 Amer. & Eng. Ency of Law, *supra*.

As establishing this ground of defense, the sheriff (appellee) introduced in evidence a bill of sale to which was attached the signature of the firm and which was also signed by the members of the firm (defendants in the execution), showing a sale of the goods in question to H. H. Newell, John Thess and John Nickerson for the sum of \$350, and proved that possession of the goods passed under the said bill of sale to said Newell, Thess and Nickerson some two weeks before the judgment in favor of the appellant was confessed. The appellant contended that the sale was fraudulent and void as to creditors, because (1) the consideration was grossly inadequate; (2) that the sale was negotiated with but one of the partners in the bill of sale in payment of claims amounting to \$350, due to them from the firm; (3) that the sale was upon condition that the goods should be sold by the vendees named in the bill of sale and the proceeds applied as far as necessary to the payment of the claims of Newell, Thess and Nickerson against the firm and the remainder returned to the members of the firm. The trial court rightly held that under the evidence the sale could not be branded as fraudulent upon the ground that the consideration was inadequate. It appeared that the vendees retained the stock of goods for more than two weeks, during which time they sought diligently to secure a buyer and finally closed out the entire stock at \$400. Miss Straley testified that, in her opinion, the goods were worth much more, but two witnesses, both milliners, were of opinion that \$400 was their full value. As to the second and third grounds

of attack upon the validity of the sale it appeared that Mrs. Schlagel, in the absence of her partner, sold and delivered the goods to the purchaser in payment of *bona fide* debts due them from the firm. She executed a bill of sale in the name of the firm, and also signed her name to it and delivered it and the goods to the purchasers. It is not contended that any secret agreement was made with her or that any promises were given to her to return the excess of the proceeds of the sale to her and partner or either of them. It was an absolute, unconditional and completed sale so far as one member of the firm could lawfully conclude such a transaction. The power of a partner in this regard seems to be settled in this State by the case of Hanchett v. Gardner et al., 138 Ill. 591, where it was said: "The rule is a just one, and supported by the weight of authority, and is that a sale made by one partner of the assets of a firm in payment of a *bona fide* existing firm debt to a creditor without notice, is valid, and that a fair sale made in good faith to an existing *bona fide* creditor by one partner without the consent of the other may, under circumstances of notice to the purchaser or transferee be questioned by the non-assenting partners, but it is good as to all third persons." In the same case it was ruled that a creditor has the right to seek and obtain from his debtor a preference for the payment of his own debts to the exclusion of other creditors, and that without the imputation of fraud upon either party. Appellant, however, claims that the signature of the other partner, Miss Straley, was obtained to the bill of sale under secret contract and agreement that the members of the firm reserved and were to receive the proceeds of any sale made of the goods in excess of the amounts of the debts due from the firm to the transferees. There was evidence tending to show that after the execution of the bill of sale and the delivery of the goods to the transferee by one partner that some such promises were made to the other partner, or perhaps at other later times, to both partners. But this was after the completion of an absolute, unconditional and valid sale and delivery of the goods. Whether whatever

was done and said after the sale had been so completed may be availed of by the partners as against the transferee need not be considered. It is certain it could not operate retroactively upon the sale and avoid it in favor of and upon the application of a creditor of the firm.

The propositions of law held by the court covered the legal principles sought to be presented in the propositions that were refused, so far as they were applicable to the case.

No reasons appear for interference with the judgment. It will be affirmed.

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City of Champaign v. William Maguire.

1. **CITIES AND VILLAGES—Sewerage and Sewers.**—Where a city has a system of sewerage or maintains a sewer, it stands charged with notice that the same is offensive.

2. **SEWERS—Use of by Third Parties.**—A city is not liable for a misuse or improper use of its drains or sewers by third parties, unless it has consented thereto or negligently permitted such improper use after knowledge thereof.

3. **EVIDENCE—Matters Conceded to be True.**—The refusal to admit in evidence matters tending to prove facts conceded by the adverse party is not error.

Memorandum.—Action for a nuisance. In the Circuit Court of Champaign County; the Hon. FRANCIS M. WRIGHT, Judge, presiding. Declaration in case; plea, not guilty. Trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the November term, 1894, and affirmed. Opinion filed February 11, 1895.

E. L. SWEET, city attorney, and J. L. RAY, attorneys for appellant.

OLON PHILBRICK, ROY WRIGHT and A. J. MILLER, attorneys for appellee.

MR. JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.
The action below was a case to recover damages against

City of Champaign v. Maguire.

the appellant for, as it was alleged, "so constructing and maintaining a sewer that foul and offensive matter from which noxious odors arose was discharged in close proximity to the home of appellee and his family, whereby the premises of the appellee were rendered unwholesome and unfit for occupancy," etc. The judgment was for the appellee in the sum of \$375, from which this appeal. It was abundantly proven that foul and offensive matter, such as is usually discharged from sewers, was deposited near the home of the appellee and that obnoxious and unwholesome odors arose therefrom and permeated the atmosphere to his detriment and damage. The city relied upon two defenses quite distinct in character. We may first consider its contention that the sewerage from which the obnoxious stench arose, of which the appellee complained, did not come from its sewer or drain, but from a sewer maintained in the adjoining city of Urbana. No objection was made to any rulings of the court in this connection. The only complaint is, as to the action of the jury, upon the evidence. We have consulted the evidence presented in the abstract and find that it was conflicting and presented a fair issue of fact for the determination of the jury.

No reason appears why we should assume to interfere with their action upon it. The other defense which the appellant city sought to maintain, was that it had no system of sewerage and that the work of which the plaintiff complained was not a sewer but only a drain constructed for the purpose of conveying surface waters from the streets and alleys of the city. Counsel for the city concede that if a city has a system of sewerage or maintains a sewer that it stands charged with notice that it is offensive, but insist that in this instance it appeared from the evidence that the city had only a drain, and that before it could be made liable it must be shown, not only that sewerage matter was discharged from the drain, but that the city either permitted it to be perverted to the purpose of a sewer, or did not use due diligence to prevent such perverted use of it. It is not necessary that we should express an opinion upon the legal

aspects of the position here assumed by counsel, for the reason that the trial court accepted the view expressed by counsel for the city as the correct rule of law applicable to the case and so directed the jury. The court instructed the jury on that point as follows: "The court instructs the jury that the city of Champaign is not liable for misuse or improper use of its drains or sewers by third parties unless it has consented thereto or negligently permitted such improper use after knowledge thereof, if the evidence shows any such fact." The effect of this instruction was to reduce the contention to a question of fact for the determination of the jury. The jury determined it against the city and a careful examination of the evidence has convinced us that no other conclusion was admissible under the testimony. It is, however, complained that the court refused to admit competent evidence offered by the city in support of this issue in its behalf. The specific ground of alleged error in this respect is that the court refused to admit in evidence the following ordinance of the city, viz.: "Be it ordained by the City Council of Champaign * * * Sec. 18. No privy or cesspool shall be drained into any public sewer under a penalty of not less than fifty dollars for each offense, and a like penalty for each week the same may be continued." The plaintiff below alleged in his declaration that the city by its ordinances prohibited the use of its sewers for the drainage of privies, etc. Had the ordinance been introduced by the city, the effect would only have been to prove a fact conceded by its adversary to be true. Hence the cause of the city was not prejudiced by the ruling of the court. We find no error demanding interference with the verdict of the jury or the judgment of the court therein. The judgment must be and is affirmed.

City of Champaign v. Beasley.

City of Champaign v. Manzella Beasley.

1. CITIES AND VILLAGES—*Sewers—Nuisances.*—This case is governed by the case of *The City of Champaign v. Maguire, supra.*

Memorandum.—Case. Appeal from the Circuit Court of Champaign County; the Hon. FRANCIS M. WRIGHT, Judge, presiding. Affirmed. Opinion filed February 11, 1895.

E. L. SWEET, city attorney, and J. L. RAY, attorneys for appellant.

SOLON PHILBRICK, ROY WRIGHT and A. J. MILLER, attorneys for appellee.

MR. JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

The material facts and the points in law arising upon this record are the same presented by the record in the case of *The City of Champaign v. William Maguire* decided by this court at this term.

The opinion rendered in that case is applicable to and disposes of all questions necessary to be determined in this, and resting upon it as authority, the judgment herein is affirmed.

Hanover Fire Ins. Co. v. Abner R. Orr, Assignee of Willis B. Cauble.

Citizens Fire Ins. Co. v. Abner R. Orr, Assignee of Willis B. Cauble.

1. INSURANCE—*Transfer of the Property Avoids the Policy—Voluntary Assignments.*—A voluntary assignment for the benefit of creditors by the insured of the property mentioned in a policy, containing a condition that if the property or any interest therein be sold or transferred or any change takes place (other than by death of the insured) in the

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interest, title or possession, whether by legal process, judicial decree or voluntary transfer the policy shall be void, works a forfeiture of the insurance.

2. *SAME—Insured Must Have an Interest at the Time of the Loss.*—The insured can not recover unless he has an interest in the property at the time of the loss, and an absolute alienation works a forfeiture of the insurance whether so stipulated in the policy or not, if the property remains out of the insured at the time of the loss.

3. *CONTRACTS—Courts Do Not Insert Conditions.*—It is the judicial province to enforce the contract as the parties have made it, unless modified by waiver or estoppel, without inserting conditions which the parties have not made.

Memorandum.—*Assumpsit.* In the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Declaration on a policy of insurance; plea, general issue; jury waived; trial by the court; finding and judgment for plaintiff; appeal by defendant. Heard in this court at the November term, 1894, and reversed. Opinion filed February 11, 1895.

APPELLANTS' BRIEF, THOMAS BATES AND LAWRENCE & LAWRENCE, ATTORNEYS.

Appellants contended that under the conditions of the policy, the insurance was forfeited by a voluntary assignment of the property. *Reaper City Ins. Co. v. Brennan*, 58 Ill. 158; *Dadmun Mfg. Co. et al. v. Worcester Fire Ins. Co.*, 11 Metc. (Mass.) 324; *Young et al. v. Eagle Fire Ins. Co.*, 14 Gray (Mass.) 150; *Perry v. Lorillard Fire Ins. Co.*, 61 N. Y. 214; *Dey et al., Assignees, etc., v. Poughkeepsie Ins. Co.*, 23 Barb. (N. Y.) 623.

APPELLEE'S BRIEF, W. J. CALHOUN & H. M. STEELY, ATTORNEYS.

A general assignment for the benefit of creditors is not a violation of the conditions in a policy against alienation or change of title or interest. *App. Iron Co. v. B. Am. Assurance Co.*, 46 Wis. 23; *Phenix Ins. Co. v. Lawrence*, 4 Met. (Ky.) 9; *Fayette Co. Ins. Co. v. Neel* (Pa. St.), 8 Ins. L. J. 265; *Starkweather v. Cleveland Ins. Co.*, 2 Abb. (U. S.) 67; *Lazarus v. Commonwealth Ins. Co.*, 19 Pick. (Mass.) 81; *Gordon v. Mass. Fire & Marine Co.*, 2 Pick. (Mass.) 249.

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Such a conveyance is only in trust, to apply the proceeds to the payment of the debts of the assignor and return the surplus or undisposed-of property to him. *Walker v. Ross*, 150 Ill. 50; *Farwell v. Nilson*, 133 Ill. 45; *Weber v. Mick*, 131 Ill. 533; *Burrill on Assignments*, Secs. 2-3.

Any alienation which leaves in the insured an insurable interest, does not avoid the policy. *Ag'l Ins. Co. v. Clancy*, 9 Brad. 137; *Hanover Fire Ins. Co. v. Connor*, 20 Brad. 297; *Scammon v. Ins. Co.*, 20 Brad. 500; *Assurance Co. v. Scammon*, 126 Ill. 355; 1 *May on Insurance*, Sec. 264; *Ayers v. Hartford Ins. Co.*, 17 Iowa, 176.

The naming in a policy of certain things as constituting an avoidance of the policy, is to be taken as the exclusion of all others. Failure to name an assignment for benefit of creditors in these policies, was in effect saying that such a conveyance did not fall within the prohibited acts in the policy. *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53; *Smith v. Ins. Co.*, 50 Me. 96; *Masters v. Ins. Co.*, 11 Barb. 624; *Rollins v. Ins. Co.*, 5 Foster, 204.

Provisions in policies in the nature of forfeitures are inserted for the benefit of the company, and are to be strictly construed against the insurer, and no intendments will be indulged in favor of a forfeiture thereunder. *Rockford Ins. Co. v. Storig*, 137 Ill. 646; *Aurora Fire Ins. Co. v. Eddy*, 55 Ill. 213; *Hoffman v. Aetna Ins. Co.*, 32 N. Y. 405; *Raun v. Home Ins. Co.*, 59 N. Y. 387; *Union Mut. Acc. Ass'n v. Frohard*, 134 Ill. 228; *German Ins. Co. v. Miller*, 39 Ill. App. 633; *Illinois Mut. Ins. Co. v. Hoffman*, 31 Ill. App. 295; *Paul v. Ins. Co.*, 112 N. Y. 472.

MR. PRESIDING JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The appellant insurance companies issued to Willis B. Cauble a joint policy known as the "Underwriter's Policy" insuring said Cauble in the sum of \$2,000 against loss by fire upon a two-story brick business building in the town of Sidell, Vermilion county, Illinois. The building was destroyed by fire within the period covered by the policy.

On the 4th day of August, 1893, five days before the fire, the said Cauble made a voluntary assignment of all his property for the benefit of creditors to Abner R. Orr, the appellee, and delivered possession to said assignee on that day. At the date of the fire, judgments by confession had been entered against Cauble in the Circuit and County Courts of said Vermilion county, five in number and aggregating \$1,497.18. These judgments were entered at different times between the 31st day of July and August 4th, inclusive, upon judgment notes previously given by said Cauble.

The policy provided that "if the property or any interest therein be sold or transferred or any change takes place (other than by the death of the insured) in the interest, title or possession, whether by legal process or judicial decree or voluntary transfer of the assured, then and in every such case this policy shall be void * * * or if the property become subject to lien or incumbrance by virtue of any mortgage, deed, or trust, judgment or decree, then, and in every such case this policy shall be void, unless otherwise provided by agreement indorsed hereon."

Attached to the policy was a "mortgage clause," by which the loss, if any, was payable to Danville Building Association, etc., which clause expressly provided that as to the interest of the mortgagor no act or neglect of the insured should invalidate the policy. Proofs of loss having been made, the appellant companies paid to said mortgagee \$1,111.18, being the proportion of those companies upon the mortgage, leaving unpaid upon the face of the policies, \$888.82, which was claimed by the assignee and for which the companies denied liability, whereupon the assignee brought suits, and the issues having been submitted to the court, a jury being waived, recovered judgments for said balance, from which the said companies have prosecuted these appeals.

They insist that by reason of said judgments, as well as because of the making of said assignment and the delivery of possession thereunder, the conditions of the insurance were broken and they were discharged.

They also insist that the assignee, having no contractual relations with them, can not sue them.

The provision of the policy above quoted as to sale, transfer or change of interest, title or possession, is very broad and comprehensive. If any sale or transfer of the property or any interest, or any change in the title, interest or possession takes place, the policy is void. Language could hardly be more explicit. The assured transferred to the assignee all his property, including that covered by the policy, and surrendered possession accordingly.

Very clearly this worked a change in his title, interest and possession. It is not deemed necessary to discuss the various arguments adduced by counsel and the authorities cited in support of their respective positions. We have given the subject due consideration, and are of the opinion the making of the assignment and the delivery of possession thereunder worked a forfeiture of the insurance.

May on Insurance, Sec. 264, says it is a general principle that the insured can not recover unless he has an interest in the property at the time of the loss, and that an absolute alienation works a forfeiture, whether so stipulated in the policy or not, if the property remains out of the insured at the time of the loss, and that a transfer to the assignee by decree of court of a bankrupt's estate under the bankrupt laws of the United States upon the bankrupt's petition is an alienation. In such case the property is vested in the assignee, and though the proceedings may be stayed and the property may revert in the bankrupt, this is a contingency too remote to be considered the foundation of an insurable interest in the bankrupt; and he adds: "And of course a voluntary assignment for the benefit of creditors is equally a transfer, unless possession be retained by the assignor."

Authorities may perhaps be found to the effect that when the assignor is not, by the insolvency proceedings, discharged from the payment of his debts, he still retains an insurable interest. We can not concede that such ruling could be well made, in the face of the provision in this policy. As was said in *Young v. Eagle Fire Ins. Co.*, 14 Gray, 150,

"The question here is not merely whether there was an insurable interest. The rights of the parties are to be settled by reference to this policy, made and accepted under the conditions and limitations expressed in the by-laws as declared on the face of the policy."

Much as courts may deprecate the effort of insurance companies to hedge their liability with numerous and unreasonable conditions, it is the judicial province to enforce the contract as parties have made it, unless modified by waiver or estoppel, without inserting conditions which the parties have not made. Whatever may be the contingent interest of the assignor in the subject-matter of his estate and whatever may be his liability for the portion of his indebtedness not discharged by the proceedings under the assignment, there can be no question that the title to the property has passed from him; his authority and dominion over it have wholly ceased; his possession is gone. In a contingency, a part of the proceeds may be returned to him, possibly some of the property may be returned in specie, but this is wholly uncertain, and according to all experience, most unlikely. To say that an act attended with such consequences does not operate to produce a substantial change "in the interest, title or possession," is to deliberately reject and ignore the plain meaning of the language used in the policy.

So of the provision relating to liens by judgment. The terms there employed need no construction and can not well be misunderstood.

Precedents are not wanting upon this point. Among others, *Seybert v. Ins. Co.*, 103 Penn. St. 232, may be cited, but if there were no precedents we could not hesitate. It is not important to determine the exact reason for inserting such conditions in a policy. It is enough to say, however, that the contract of insurance is personal. The person named is insured to the extent and under the conditions prescribed upon the property named. It may or may not be equally as safe to continue the insurance when his circumstances change or when by reason of his acts or business liabilities other interests intervene. The condition that such changes

shall vitiate the contract is not against good morals or public policy and when it has not been waived it must be enforced. It will not do to inquire whether in this instance the loss was in any respect to be attributed to such changes, for that would be to add a clause to the condition by way of limitation. The condition should be regarded as it reads.

In the view we thus take of the case, there is no occasion to consider the point that the assignee could not sue in his own name. If the policy was vitiated there was no right of recovery and it is immaterial who is the plaintiff when there is no liability to any.

We are of opinion there was no cause of action. The judgment will be reversed but the case will not be remanded.

**National Fire Insurance Company, of Hartford v.
Abner R. Orr, Assignee of W. B. Cauble.**

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1. *INSURANCE—Ownership of the Property Insured.*—A condition that a policy of insurance shall be void if the insured is not the sole, entire and unconditional owner of the property, is satisfied if the insured is such owner at the time the policy was issued.

2. *SAME—Change of Title.*—A condition that a policy of insurance shall be void if there shall be any sale, transfer, mortgage, or change of title, or of possession of the property, or of any individual interest, refers to the future, and is designed to relieve the insurer in case of such sale, transfer, mortgage or change of title or possession.

3. *SAME—Authority of Agents to Waive Conditions.*—When a policy of insurance provides that agents shall not make agreements for the company, of any kind, except in writing or print, or change, alter or waive any written or printed contract made with the company except in writing or print, the implication is that such agents may change, alter or waive such contracts in writing or print.

Memorandum.—Assumpsit. In the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Declaration on a policy of insurance; plea of the general issue; trial by the court; judgment for plaintiff; appeal by defendant. Heard in this court at the November term, 1894, and reversed. Opinion filed February 11, 1895.

LAWRENCE & LAWRENCE, with THOMAS BATES, attorneys for appellant.

W. J. CALHOUN and H. M. STEELY, attorneys for appellee.

MR. PRESIDING JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

In this case the policy was issued to Cauble, who made an assignment to Orr, as stated in the two preceding cases, five days before the fire. The judgment was for \$888.88, the amount remaining after paying, under the provision of a "mortgage clause" the same as in the two preceding cases, the sum of \$1,111.18 to the mortgagee. The provision in the policy upon which the company relies for its defense reads as follows: "This policy shall be void if the assured is not the sole, entire and unconditional owner of the property, or if there shall be any sale, transfer, mortgage or change of title or of possession of the property insured, or of any individual interest therein, other than by succession by death of the assured."

The first clause of this provision, that the assured must be the sole, entire and unconditional owner, is not in terms applicable to the condition at the time of the fire. The condition thus expressed may be satisfied if the assured was such owner at the time the contract was made. The company having chosen the language must expect such a construction as would be most unfavorable to itself. The residue of the clause, however, clearly refers to the future, and was designed to relieve the insurer in case of the specified sale, transfer, mortgage or change of title or possession. This is substantially the same as the clause on that subject in the two preceding cases of *The Hanover* and *The Citizens* companies against Orr. What we have said on this point in those cases is applicable here, and need not be repeated.

We are of the opinion the plaintiff had no cause of action.

The judgment will therefore be reversed, but the cause will not be remanded.

Hartford Fire Ins. Co. v. Abner Orr, Assignee of Willis B. Cauble.

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1. **INSURANCE—Change of Possession and Title of Insured Property.**—A condition of a policy of insurance providing that the insurance shall be forfeited if the interest of the assured shall be other than sole and unconditional ownership, or if any change other than by death of the assured takes place in the interest, title or possession of the property insured, is broken by a voluntary assignment by the assured of the property insured, for the benefit of creditors.

2. **SAME—Waiver of Conditions.**—An agent with authority to accept risks, fix rates and sign policies, etc., issued a policy for one year, and at the expiration of the year issued a renewal receipt for another year, the premium for which was not paid. After a fire occurred the agent, with full knowledge thereof, notified the assignee of the insured (he having since the renewal and before the fire made an assignment), that unless the premium was paid the insurance would be canceled for non-payment. On the day following, the assignee paid the premium and took the renewal receipt in his name. *It was held* that these acts were equivalent to a waiver of all objections growing out of the transfer and change of title, interest and possession by means of the assignment.

3. **SAME—Who is a General Agent.**—A resident agent of an insurance company having general authority to issue policies and renewals, to fix rates and accept risks, to collect premiums and to cancel insurance for the company and perform all the duties of a recording agent, may be termed a general agent for the locality.

4. **SAME—What Acts Estop the Company—Waiver of Conditions.**—An insurance company by its agent issued a renewal of a policy without a payment of the premium therefor, and after a loss, with full knowledge of the same, made a demand for and received the premium, and after the commencement of a suit to recover for the loss the company attempted to return the money. *It was held* that the attempt by the company to obviate the effect of what had been done by offering to return the premium could not avail. Having demanded and received the money and having held it for a substantial period of time, it could not be permitted to undo its action and place itself *in statu quo* without the consent of the other party.

5. **INSURANCE—Assignment of Policy—Waiver of the Right to Object—Estoppel.**—An insurance company issued a policy and renewed the same at the end of a year without insisting on the payment of the premium in advance. After the renewal the insured made an assignment of the property for the benefit of his creditors and a loss occurred, after which and with a full knowledge of the same the agent demanded of the assignee and received of him the full payment of the premium. *It*

was held that by receiving the unpaid premium from the assignee the company waived its right to object to the assignment and could not be heard to say that the policy was assigned without its consent.

6. **WAIVER—Assignment of Insurance Policies.**—Where there is a waiver of all objections to the change in title, interest or possession growing out of an assignment of an insurance policy, thereby continuing the policy as a valid and subsisting contract, the enforcement of which is vested in the assignee, nothing more is necessary.

Memorandum.—Assumpsit. In the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Declaration on a policy of insurance; plea, general issue; jury waived and trial by the court; finding and judgment for plaintiff; appeal by defendant. Heard in this court at the November term, 1894. Reversed and judgment entered in this court. Opinion filed February 11, 1895.

APPELLANT'S BRIEF, THOMAS BATES AND LAWRENCE & LAWRENCE, ATTORNEYS.

An insurance company has a right, in a fair way, to limit the powers of its agent, and when it does impose such limitations upon his authority, in a way that no prudent man ought to be mistaken in reference thereto, it is not bound by an act done by its agent in contravention of such notice. *Zimmerman v. Home Ins. Co.*, 77 Ia. 685; 42 N. W. Rep. 462; *Merserau v. Phoenix Life Ins. Co.*, 66 N. Y. 274; *Walsh v. Hartford Ins. Co.*, 73 N. Y. 5; *Loring v. Manufacturers Ins. Co.*, 74 Mass. (3 Gray) 32; *Catior v. Am. Life & Trust Co.*, 33 N. J. L. 487.

A local agent has no authority whatever to waive any conditions of a policy after the loss has occurred.

It can not be held that the authority of an agent to receive proposals for insurance and countersign and deliver policies, extends to adjusting losses or waiving the stipulated proofs of loss, or binding the company to pay without them; neither can it be held that the mere fact that such an agent assuming in a particular case to do this, establishes his authority. *Bush v. Westchester Fire Ins. Co.*, 63 N. Y. 531; *Lohnes v. Insurance Co.*, 121 Mass. 439; *Harrison v. Ins. Co.*, 9 Allen (Mass.) 231; *Tate v. Ins. Co.*, 13 Gray (Mass.) 79; *Wood on Insurance* (2d Ed.), 870.

APPELLEE'S BRIEF, W. J. CALHOUN AND H. M. STEELY,
ATTORNEYS.

Any act of the company or its agents, showing knowledge of conditions, or a failure to take advantage of and insist on a forfeiture after knowledge, will amount to a waiver of the right of forfeiture; and it is always competent for the party who is to be benefited by the forfeiture to waive such right. By some this waiver is said to operate by way of estoppel. *Reaper City Ins. Co. v. Jones*, 62 Ill. 458; *Lycoming Ins. Co. v. Barringer*, 73 Ill. 230; *Williamsburg C. Ins. Co. v. Cary*, 83 Ill. 453; *Schrimp v. Cedar Rapids Ins. Co.*, 124 Ill. 354; *N. B. & M. Ins. Co. v. Steiger*, 26 Ill. App. 225; *Life Ins. Co. v. Amerman*, 119 Ill. 335; *Phenix Ins. Co. v. Hart*, 149 Ill. 513; 1 May on Ins., Sec. 145; Note 2, 11 Am. & Eng. Ency. Law, pp. 339-340.

Where insured is guilty of some breach of the conditions of his policy, and insurer, with full knowledge thereof, and while the risk is pending, accepts a maturing premium, or does any other act recognizing a continued validity of the policy, this will waive a forfeiture for the breach. *Schrimp v. Cedar Rapids Ins. Co.*, 124 Ill. 354; *Germania Fire Ins. Co. v. Hick*, 125 Ill. 361; *Williamsburg C. F. Ins. Co. v. Cary*, 83 Ill. 453.

This waiver, by acceptance of premium, or other act, may take place as well after a loss as before. In such case the policy is not simply revived as to the future, but it thereby restores to it its power and force from the beginning. *Phenix Ins. Co. v. Tomlinson*, 125 Ind. 84; *Ins. Co. v. Custer*, 128 Ind. 25; *Replogle v. Ins. Co.*, 132 Ind. 360; *Masonic Mut. Ben. Ass'n v. Beck*, 77 Ind. 203; *Continental Ins. Co. v. Chew*, 33 N. E. Rep. 417; *Joliff v. Ins. Co.*, 39 Wis. 111; *N. B. & M. Ins. Co. v. Steiger*, 26 App. 228; *Life Ins. Co. v. Amerman*, 119 Ill. 335; *Phenix Ins. Co. v. Hart*, 149 Ill. 513; 1 May on Ins., Sec. 145; Note 2, 11 Am. & Eng. Ency. Law, pp. 339-340.

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One authorized to issue policies, attach stipulations, collect premiums and to transact the business of the company in the particular locality, is a general agent. Such an agent may waive conditions in the policy, notwithstanding a clause therein forbidding it or limiting his authority, or making him agent of assured, and notice to him is notice to the company. *Continental Ins. Co. v. Ruckman*, 127 Ill. 372; *Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 6; *Viele v. Germania Ins. Co.*, 26 Iowa 9; 1 May on Ins., Sec. 126; *Niagara Fire Ins. Co. v. Brown*, 123 Ill. 356; *Manufacturers', etc., Ins. Co. v. Armstrong*, 145 Ill. 469; *Phenix Ins. Co. v. Hart*, 149 Ill. 513.

MR. PRESIDING JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This action was two policies of insurance, one for \$3,000 on a two-story brick building used for business purposes, the other for \$1,000 on chairs, carpets, scenery, opera boxes and piano contained in the second story of the building.

The insured made an assignment for the benefit of cred-

itors on the 4th of August, 1893, and the fire occurred on the 9th of the same month, as stated in the three preceding cases.

Each policy contained a clause to the effect that it should be void, unless otherwise provided by agreement indorsed thereon or added thereto, "if the interest of the assured be other than sole and unconditional ownership, or if any change other than by the death of the insured take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured or otherwise." The plaintiff recovered the amount of both policies. We are disposed to hold here, as in the preceding case of the National Insurance Company against Orr, that the first condition as to the sole and unconditional ownership was satisfied if such was the character of ownership when the policy was issued, but that the second condition that there should be no change in the interest, title or possession of the subject of insurance was broken by the deed of assignment and possession thereunder.

It is insisted, however, that notwithstanding this objection the company may be held on another ground, to wit, the demand and receipt from the assignee of the unpaid premium on the renewal.

It appears that these policies (and others in other companies covering the dwelling house of said Cauble) were issued by C. H. Hathaway, who was an agent for the appellant company at Ridge Farm. His agency was known "as a recording agency, and he had authority to issue, accept risks, fix rates and sign policies of insurance for said defendant, to collect premiums, to issue renewal receipts, to cancel insurance and renewals thereof, and generally to transact insurance business for said company in said town of Farm Ridge, Illinois, and vicinity, and to perform all the duties incident to a recording agency," as is stated in a stipulation of facts which was offered in evidence.

The policy for \$3,000, numbered 839, was issued May 12,

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1892, for one year, and on the 12th of May, 1893, the said Hathaway, as such agent, issued to Cauble a renewal thereof for one year, and received from him the premium therefor. The policy for \$1,000, numbered 883, was issued the 21st of July, 1892, for one year, for which the premium was paid, and on the 21st of July, 1893, the said agent issued to said Cauble a renewal receipt, No. 613, for one year, the premium for which was not then paid. After the fire, and with knowledge of the same, the said Hathaway wrote to the assignee as follows :

RIDGE FARM, ILL., Sept. 8, 1893.

Original Notice.

To Mr. Ab. Orr, Assignee of Dr. Cauble :

You are hereby notified that payment has not been made at this office of the premium, \$63, for policies 424, 948, 883, 613, renewal upon dwelling and contents of opera house, issued in the Hartford Fire Insurance Co., of Hartford, Conn., and that unless the premium shall be paid on or before the 11th day of September, 1893, we shall cancel the insurance under said policies upon the books, for non-payment of premium.

Yours respectfully,

C. H. HATHAWAY,

Agent for Ins. Co. of Hartford, Conn.

On the next day the assignee paid to said agent the sum of \$13.50 due on said renewal, and thereupon said agent gave him the following receipt :

RIDGE FARM, Ill., Sept. 9, 1893.

Received of Ab. Orr, assignee of Dr. Cauble, \$13.50, on policy No. 883, renewal 613, Hartford Insurance Co.

C. H. HATHAWAY,

Agent.

This money was, as we infer, transmitted to the company. On the 30th day of January, 1894, some two weeks after this, suit was commenced and process thereon served upon its agent. The company sent its check for \$13.50 to the assignee, inclosed in the following letter :

Hartford Fire Ins. Co. v. Orr.

CHICAGO, January 30, 1894.

Abner R. Orr, assignee of Dr. W. B. Cauble, Sidell, Ill.

DEAR SIR: Inclosed find check for \$13.50, payable to your order, repaying to you the amount of premium improperly collected from you, as assignee, by Agent Hathaway, of Ridge Farm, for policy No. 883, issued to Dr. Cauble a few days after his assignment and fire. Our attorney, Mr. Bates, having just notified us of it, we therefore hasten to return the same to you, and remain,

Yours very truly,

P. J. HOBBS, Adjr.

Two days later the assignee returned the check, saying he could not receive it, and that he had paid the money on the order of the County Court, after notice from the agent, Mr. Hathaway, that such payment must be made. So far as shown by the record, nothing further was said or done on either side as to this matter. The question arises, what was the legal effect of this transaction?

It appears that Hathaway had general authority to issue policies and renewals; to fix rates; to accept risks; to collect premiums; to cancel insurance for the company, and perform all the duties incident to a recording agency. He might be termed a general agent for that locality. May on Ins., Sec. 126; Continental Ins. Co. v. Ruckman, 127 Ill. 364.

He had power to make a new contract of insurance, and to waive errors and irregularities in reference to an old one. We think his act, after knowledge of the fire and that Orr was the assignee of Cauble, in demanding payment from Orr of the unpaid premium on the renewal, with the declaration that unless paid by the day named the policy would be declared canceled, coupled with the payment made and accepted in pursuance of such demand, was equivalent to a waiver of all objections growing out of the transfer and change of title, interest and possession by means of the assignment. It seems that this demand by the agent was made with no little deliberation, for the letter was sent by registered mail, so that the proof of its delivery to the as-

signee might be easily established, and that, although the money was paid to him on the 9th of September, and presumably transmitted to the company without delay, it was retained by the company until January 30th, more than four months after its payment.

There is no proof that this demand was in violation of any instruction from the company to its agent, or even that it was without authority, or that in receiving it from the agent the executive officers of the company did not know what it was. The attempt by the company to obviate the effect of what had been done by offering to return the money, can not avail. Having demanded and received the money, and having held it for a substantial period of time, it can not be permitted thus to undo its own action and thereby place itself in *statu quo* without the consent of the other party.

The waiver thus established amounts also to consent to the assignment of the policy which was involved, and included in the general assignment of all the property of the assured to Orr. By accepting from Orr, as assignee, the amount of unpaid premium, the assignment to Orr was distinctly recognized, and he having, in pursuance of the demand and of the order of the County Court, appropriated a part of the funds of the estate to the payment, the company can not be heard to say that the policy was assigned without its consent. Indeed, since by the statute, Sec. 11 of the act in relation to voluntary assignments, the assignee may sue in his own name for anything appertaining to the estate, the assignment of the property is, perhaps, of itself, a sufficient transfer of the policy thereon, and when the company, with full knowledge of the facts, recognizes the character of the assignee and receives money from him in that capacity, and thereby waives all right of objection to such assignment of the property, such action of the company may be treated as equivalent to consent to the assignment of the policy.

Perhaps a more accurate statement is that as there is a waiver of all objection to the change in title, interest or

possession growing out of the assignment, thereby continuing the policy as a valid and subsisting contract, the enforcement of which is by the statute vested in the assignee, nothing more is necessary.

We are of opinion that as to this policy for \$1,000, the plaintiff had a good cause of action, but we are unable to agree with counsel that the same is true as to the other policy.

The mere fact that the two policies were issued by the same company through the same agency can not render the company liable alike upon both policies. There was nothing whatever done with regard to the policy upon the building which was renewed in May when the premium was paid. Whatever was done by the agent or the company after the assignment, related wholly to the policy for \$1,000, which was upon the contents of the building.

It follows that in our opinion the judgment was right so far as it enforced liability on policy No. 883, for \$1,000, but that it was erroneous so far as it included also the other policy No. 839 for \$3,000. The judgment will therefore be reversed and judgment will be entered in this court for the appellee against the appellant for \$1,060.50, being the amount of the policy for \$1,000, and interest thereon. The appellant will pay the costs below and one-half the costs in this court; the appellee will pay the residue. Reversed, and judgment in this court.

**The German Insurance Company, of Freeport, Illinois,
v. Abner B. Orr, Assignee of W. B. Cauble.**

1. **INSURANCE—Waiver of Conditions.**—Where an agent, having authority to accept risks, fix rates, sign and issue policies, etc., issued a policy upon which the premium was not paid, and afterward and before a fire occurring, the insured made a voluntary assignment of the property insured, for the benefit of his creditors, and after the fire the agent notified the assignee that unless the premium was paid the policy would

be canceled, and the same being paid by the assignee, *it was held* that these acts were equivalent to a waiver of all conditions of the policy relating to an alienation or change of title without the consent of the company indorsed on the policy, or that it should not be binding until the premium was actually paid or unless payment was made before a fire occurred.

2. *SAME—Waiver of the Payment of Premiums.*—A condition in a policy of insurance that it is not to be binding upon the company until the premium is actually paid, nor unless payment is made before a fire occurs, may be waived by the company.

Memorandum.—*Assumpsit.* In the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Declaration on a policy of insurance; plea of the general issue; jury waived, and trial by the court; finding and judgment for the plaintiff; appeal by defendant. Heard in this court at the November term, 1894, and affirmed. Opinion filed February 11, 1895.

APPELLANT'S BRIEF, LAWRENCE & LAWRENCE, ATTORNEYS.

While it may be said the agent had general powers of agency, yet he could only act within the scope of such general powers, and the right to make an agreement of insurance binding upon his principal, of property not then existing, is not within the scope of such power, and the insured having paid the premium after the loss, is presumed to have known the agent had not the right to bind his principal by accepting it. And though it appear that this premium came to the hand of the company, the presumption is that it came in the ordinary course of business and the burden is upon plaintiff to show that the company had knowledge of the condition of the facts when it received the money. *Union M. Ins. Co. v. McMillen*, 12 Am. Law Reg. 610; 24 Ohio 67; *Genl. Ins. Co. v. Ruggles*, 12 Wheat. (U. S.) 411; 1 May on Ins., Sec. 123, note 2; *Mead v. Phoenix Ins. Co.*, 32 N. E. Rep. 945; *Wilson v. Ins. Co.*, 140 Mass. 210; same case in 5 N. E. Rep. 818; *Stubbins v. Ins. Co.*, 60 N. H. 65.

Where an agent having no power to waive the forfeiture of a policy, and acting in the interest of the insured, received the premiums upon a forfeited policy, after death of person whose life was insured, and sent the money to the company, which it received without knowledge of the facts, held, not

a ratification of act of agent. Union Mu. Ins. Co. v. McMillen, 24 Ohio State, 67; S. C., Am. Law Reg., Vol. 13 (1874).

If the agent has fraudulently misrepresented his authority, and the principal has received the avails of the fraud, without knowledge of the fraudulent acts of the agent, the remedy of the party injured is not upon the contract for damages, but by rescission and suit for consideration paid. Titus v. Cairo R. R. Co., 46 N. J. L. 393; Herring v. Scaggs, 73 Ala. 446; S. P. Etna Ins. Co. v. N. W. Iron Co., 21 Wis. 458.

The act to be ratified must be voidable, not void. A principal can not ratify an act which he could not have authorized in the first instance. The policy was void when the property covered by it was destroyed; a new policy could not have been authorized upon property not *in esse*; hence, agent could not take premium, and thereby create a new policy of insurance, there being no evidence to show that the time for the payment of the premium was deferred after the issuing of the policy. 1 Am. and Eng. Ency. Law, 440; Harrison v. McHenry, 9 Ga. 164; same case, 52 Am. Dec. 435; Fitzpatrick v. School Com'rs, 7 Hump. 224; same case, 46 Am. Dec. 76.

APPELLEE'S BRIEF, W. J. CALHOUN AND H. M. STEELY,
ATTORNEYS.

Where insured is guilty of some breach of the conditions of his policy, and insurer, with full knowledge thereof and while the risk is pending, accepts a maturing premium, or does any other act recognizing a continued validity of the policy, this will waive a forfeiture of the breach. Schrimp v. Cedar Rapids Ins. Co., 124 Ill. 354; Germania Fire Ins. Co. v. Hick, 125 Ill. 361; Williamsburg C. F. Ins. Co. v. Cary, 83 Ill. 453.

This waiver, by acceptance of premium or other act, may take place as well after a loss as before. In such case the policy is not simply revived as to the future, but it thereby restores to it its power and force from the beginning.

Phenix Ins. Co. v. Tomlinson, 125 Ind. 84; Ins. Co. v. Custer, 128 Ind. 25; Replogle v. Ins. Co., 132 Ind. 360; Masonic Mut. Ben. Ass'n v. Beck, 77 Ind. 203; Continental Ins. Co. v. Chew, 38 N. E. Rep. 417; Joliff v. Ins. Co., 39 Wis. 111; Smith v. Ins. Co., 3 Dak. 80; Cohen v. Ins. Co., 67 Tex. 325; Phenix Ins. Co. v. Lansing, 15 Neb. 494; Lyon v. Travelers' Ins. Co., 55 Mich. 141; 11 Am. & Eng. Ency. Law, 340, 342 and note 9.

A provision in a policy of insurance that it shall become void in a certain event, will not render the policy absolutely void. Such a provision is to be construed as though it read "voidable." It is not self-executing, but contemplates and requires future affirmative action on the part of the company. N. Y. Traveling Men's Ass'n v. Schauss, 148 Ill. 304; Viele v. Germania Ins. Co., 26 Iowa 1; Armstrong v. Tarquand, 9 Irish C. L. 32; Manufacturers' M. Ins. Co. v. Armstrong, 145 Ill. 469; Williamsburg C. F. Ins. Co. v. Cary, 83 Ill. 456; New England F. & M. Ins. Co. v. Wetmore, 32 Ill. 221; Illinois Fire Ins. Co. v. Stanton, 57 Ill. 354; Masonic Mut. Ben. Ass'n v. Beck, 77 Ind. 203.

Any act of the company or its agents, showing knowledge of conditions, or a failure to take advantage of and insist on a forfeiture after knowledge, will amount to a waiver of the right of forfeiture; and it is always competent for the party who is to be benefited by the forfeiture to waive such right. By some authorities this waiver is said to operate by way of estoppel. Reaper City Ins. Co. v. Jones, 62 Ill. 458; Lycoming Ins. Co. v. Barringer, 73 Ill. 230; Williamsburg C. Ins. Co. v. Cary, 83 Ill. 453; Schrimp v. Cedar Rapids Ins. Co., 124 Ill. 354.

MR. PRESIDING JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The policy in this case, for \$1,500 on a stock of drugs, with counters, shelving, show cases, etc., in one of the rooms of the building referred to in the preceding cases, the insured property being burned in the same fire, was issued to said Cauble on the 17th of July, 1893, for one

year, by C. H. Hathaway, the agent of appellant. The case was tried by the court and judgment was rendered for the full amount of the policy, from which the company has appealed. It was provided in the policy that in case the property should be alienated, or in case of a change of title without the consent of the company indorsed thereon, the policy should cease to bind the company, and that it should not be binding until the premium was actually paid or unless payment was made before fire occurred.

After the assignment and after the fire, on the 8th of September, 1894, the agent, Hathaway, with full knowledge of said facts, wrote to the assignee, Orr, as follows:

RIDGE FARM, ILL., Sept. 8, 1893.

Mr. Ab. Orr, Assignee of Dr. Cauble:

You are hereby notified that payment has not been made at this office of the premium of \$18.75 for policy No. 154, issued on stock of drugs, issued in the German, of Freeport, Ins. Co., and that unless the premium shall be paid on or before the eleventh day of September, 1893, we shall cancel the insurance of said policy upon our books, for non-payment of premium.

Yours respectively,

C. H. HATHAWAY,

Agent of German Insurance Company of Freeport, Illinois.

On the next day, the 9th of September, the assignee, having obtained authority from the County Court to do so, paid the amount required, \$18.75, to the said Hathaway, who thereupon gave him a written receipt as follows:

RIDGE FARM, ILLINOIS, Sept. 9, 1893.

Rec'd of Ab. Orr, assignee of Dr. Cauble, \$18.75 on policy No. 154 in German Insurance Company of Freeport, Illinois.

C. H. HATHAWAY, Agent.

On the 10th of February, 1894, the company tendered and offered to return the money so paid to the plaintiff but it was refused.

It appears from the agreed state of facts that Hathaway had the same power and authority with reference to this company that he had with reference to the Hartford Insurance Company, stated specifically in that case, nor is there anything to show that he did not promptly remit the money when so received or that the company was not aware on what account and for what purpose it was paid.

The views we expressed in the case of the Hartford Company are applicable here, and for the reason there given we are of opinion that the appellant company is liable upon the present policy.

The waiver of the provision as to payment of premiums before the fire occurs, is as clear as that of the other provisions referred to in the preceding cases.

In this policy it is expressly provided that agents are directed not to make agreements for the company of any kind except in writing or print, and that no agent is authorized to change, alter or waive any written or printed contract made with the company except in writing or in print.

The converse and the implication is that they may change, alter or waive in writing or print. The waiver here was in writing.

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**The People ex rel. David Gore, Auditor of Public Accounts, v. The Illinois Building and Loan Association, Consolidated with
Fred J. Parkhurst, Miles K. Young and F. L. Hinckley
v. Same.**

1. *RECEIVERS—Stockholders of Building and Loan Associations.*—A stockholder in a building and loan association may obviate the objection to his appointment as receiver by a transfer of his stock.

2. *SAME—Parties to Proceedings.*—The fact that a person is a party to proceedings against a building and loan association, does not necessarily disqualify him from being appointed receiver of the association in such proceeding.

3. *SAME—Appointment of—Discretion of the Court.*—The selection

The People v. Illinois Bldg. & Loan Ass'n.

of a receiver is a matter peculiarly within the discretion of the court, having in view the special circumstances of the case and fitness of the candidate for the position by reason of his occupation, experience and character.

4. *SAME—Eligibility, Disputes and Differences.*—The fact there are disputes and differences between the parties in interest, one of whom has been appointed receiver, does not of itself constitute sufficient ground for reversing an appointment of such party as receiver.

Memorandum.—Proceedings to dissolve a building and loan association. In the Circuit Court of McLean County; the Hon. ALFRED SAMPLE, Judge, presiding. Appeal from an order appointing a receiver. Heard in this court at the November term, 1894, and affirmed. Opinion filed February 11, 1895.

APPELLANTS' BRIEF, MAURICE T. MOLONEY, ATTORNEY GENERAL; T. J. SCOFIELD AND M. L. NEWELL, OF COUNSEL.

Receivers should be impartial between the parties in interest and stockholders and directors of an insolvent company should not be appointed. Beach on Receivers, Sec. 24; Atkins v. Wabash, St. L. & P. Ry. Co., 29 Fed. Rep. 161; 20 Am. & Eng. Ency., 70; Beach's Modern Equity Practice, Sec. 717.

They should not be themselves personally interested in the litigation nor the partisans of any of the contending litigants. Meier v. Kansas Pacific Railway, 5 Dillon (U. S. C. C.), 476; 20 Am. & Eng. Ency., 70; Beach on Receivers, Sec. 24.

None but an indifferent person is ordinarily eligible to the appointment as receiver. Trip v. Chard Ry. Co., 21 Eng. L. & Eq. 53; 20 Am. & Eng. Ency., 70; Smith v. New York Consolidated Stage Co., 28 How. Pr. (N. Y.) 208; Williamson v. Willson, 1 Bland (Md.) 427; Baker v. Backus, 32 Ill. 79; Beach on Receivers, Sec. 24; High on Receivers, Sec. 63; Edwards on Receivers, 3; Beach's Modern Equity Practice, Sec. 725.

Although there may be nothing against the character or ability of a person, yet if he have a private interest in conflict with the management of a company he will not only *not* be selected to receive and manage the property of such

company, but he will be removed from a position of management which he already occupies. *Trip v. Chard R. Co.*, 21 Eng. L. & Eq. 62; *Central Trust Co. v. Wabash, St. L. & Pac. Ry. Co.*, 1 Ry. & Corp. L. J. 12; *Beach on Receivers*, Sec. 24.

Stockholders and directors of insolvent corporations should not be appointed receivers thereof unless the case is exceptional and urgent, and then only on the consent of the interested parties. *Atkins v. Wabash Ry. Co.*, 59 Fed. Rep. 174; *Wiswell v. Starr*, 48 Me. 406; *Beach on Receivers*, Sec. 33; *High on Receivers*, Sec. 80; *Finance Co. v. Charleston, etc., Ry. Co.*, 45 Fed. Rep. 436; *Freeholders, etc., v. State Bank*, 28 N. J. Eq. 166; *Beach's Modern Equity Practice*, Sec. 725.

The requirement that none but a person indifferent between the parties shall be appointed as a receiver, rests upon the doctrine that the receiver is an officer of court for the benefit, not alone of the party who makes the application, but also for any others who may choose to avail themselves thereof, and, indeed, represents all the parties in interest. 20 Am. and Eng. Ency., 71; *Wyatt's Prac. Reg.*, 355; *Booth v. Clark*, 17 How. (U. S.) 331.

The rule stated by Beach in his work on *Modern Equity Practice* (Sec. 725), is as follows:

"The general rule undoubtedly is that a receiver ought to be an indifferent person, and in the full sense of the term, the representative of the court. His past relations, the influences that secured his appointment, his sympathies from whatever cause, must not be such as to predispose him either way.

"A court will not ordinarily appoint one who is *a party*, except perhaps, in partnership suits or under special circumstances; or a solicitor in the cause; or the partner of a solicitor; or a near relative of one of the parties; or *stockholders* or officers of an insolvent corporation party; nor a master in chancery who may be called upon to pass upon the receiver's accounts; or a trustee of the property; or the next friend of an infant, or the son of a next friend, etc." *Beach's Modern Equity Practice*, Sec. 725.

The People v. Illinois Bldg. & Loan Ass'n.

APPELLEE'S BRIEF, KERRICK & SPENCER, ATTORNEYS.

"The selection and appointment of a particular person for a receiver, out of several candidates proposed, is regarded as a matter of judicial discretion, to be determined by the court, according to the circumstances of the case. The exercise of this, like all other matters of judicial discretion, will rarely be interfered with by an appellate tribunal. And it may be asserted as a general rule that, to induce an appellate court to interfere with the decision of an inferior tribunal in the selection of a receiver, it is necessary to show some 'overwhelming objection' in point of propriety, or some fatal objection upon principle to the person named. And the fact that there are great disputes and differences between the parties in interest, one of whom has been appointed receiver, does not of itself constitute sufficient ground for reversing the appointment made by the court below." High on Receivers (3d Ed.), Chapter III.

MR. PRESIDING JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Circuit Court, appointing Miles K. Young receiver of the property and assets of the Illinois Building and Loan Association.

It was objected first that Young was a stockholder in the association and interested, therefore, in the corporate assets. This objection, whatever it might have been, was obviated by a transfer of his stock before the appointment.

This transfer was apparently made in good faith, and he thereby was relieved of all personal interest in that behalf.

A second objection was that he was a party to the proceedings and therefore not eligible.

That he was a party would not of necessity disqualify him, but as he has parted with his stock his connection with the proceedings is merely nominal.

It was thirdly objected that at a meeting of stockholders he made a bitter attack upon the officers of the association. We find nothing in the record to sustain this charge, and so we need not inquire whether, if true, it would necessarily disqualify him. It does appear, however, that he was the

unanimous choice of a very large meeting of the stockholders, and that while some of the officers of the association objected to his appointment there was no objection from stockholders.

It is said by Beach on Receivers, Sec. 25, that the selection of a receiver is a matter peculiarly within the discretion of the court, having in view the special circumstances of the case and fitness of the candidate for the position by reason of his occupation, experience and character; and that convincing circumstances amounting to an overwhelming objection in point of propriety, of choice, or something fatal in principle, must be shown to secure a reversal by an appellate tribunal; to the same effect is High on Receivers, Sec. 65; and further, that "the fact that there are great disputes and differences between the parties in interest, one of whom has been appointed receiver, does not of itself constitute sufficient ground for reversing the appointment made by the court below."

There is no allegation or proof against the fitness of the receiver in the present case. He seems to be satisfactory to the great body of stockholders, and the court, presumably knowing his character and qualifications, was willing to accept him as its chief agent in settling the affairs of the corporation.

We see no occasion to interfere and the order will therefore be affirmed.

John R. Carter v. James O. Andrews.

1. LANDLORD'S LIENS—*Purchasers of Grain*.—Where a person purchases grain from a party known to be the tenant of another, having a lien upon the grain for unpaid rent, or with knowledge of facts sufficient to put a reasonably prudent man upon inquiry as to existence of a landlord's lien, such person will be liable to the landlord for the reasonable value of the grain so bought up to the amount of the unpaid rent.

2. SAME—*Purchasers with Notice*.—A person who buys grain of a tenant with notice of facts from which the existence of a landlord's lien

Carter v. Andrews.

for rent arises, does so at his peril, and it is not essential to a recovery by the landlord that such person had notice that the rent was not paid.

Memorandum.—*Assumpsit.* In the County Court of Vermilion County; the Hon. J. G. THOMPSON, Judge, presiding. Trial by jury; verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the November term, 1894, and affirmed. Opinion filed February 11, 1895.

SALMANS & DRAPEY, attorneys for appellant.

ALLEN & CHAMBERLIN, attorneys for appellee.

MR. JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

The appellant, a grain dealer, in the regular course of business, bought a quantity of corn and oats from one Henry Williamson, a tenant of the appellee. As between the appellee and Williamson, the former had a lien under the statute as landlord upon the grain so sold, for the unpaid rent of the land upon which it was produced. This was an action by the appellee against the appellant to recover the reasonable value of the grain so far as necessary to discharge the amount due for such rent. Judgment below for the appellee and appeal therefrom to this court.

It appeared, without dispute, that the appellant knew when he bought the grain from Williamson that the latter had raised it on a farm belonging to the appellee, and that Williamson occupied and cultivated the farm as a tenant of the appellee. He did not know whether the rent had been paid or not, and did not inquire either of Williamson or the appellee. It was also proven that the appellant, as surety for a former tenant, paid to the appellee the rent upon the same farm for the year immediately preceding. The trial court declared the law applicable to the case in an instruction to the jury as follows:

“The court instructs the jury that if you believe from the evidence that the defendant, Carter, purchased grain from one Williamson, and at the time that Carter purchased the grain he knew that Williamson was the tenant of the plaintiff, and that he knew that the plaintiff had a landlord's lien

upon said grain for unpaid rent, or that defendant, Carter, had knowledge of facts sufficient to put a reasonably prudent man upon inquiry as to whether or not the plaintiff had a landlord's lien upon said grain, then and in such case the defendant would be liable to the plaintiff for whatever the grain he bought was reasonably worth up to the amount of unpaid rent."

We think the instruction correctly embodied the rule governing the case. *Watts v. Schofield*, 76 Ill. 261; *Prettyman v. Unland*, 77 Ill. 206; *Hunter v. Whitfield*, 89 Ill. 229.

This view is not at all in conflict with that entertained by the Supreme Court in *Finney v. Harding*, 136 Ill. 573. There the buyer of the grain purchased without notice that the seller was a tenant or knowledge of any other fact which ought have charged him with the duty of making inquiry as to the right of the seller to dispose of the property. It was not necessary in the case at bar that the appellant should have had notice that the rent was unpaid. He had notice of facts which, under the statute, created a lien in favor of the appellee upon the grain, and it became incumbent upon him before buying to exercise reasonable diligence to know whether the lien had been discharged. For this reason the court properly refused the instruction No. 1 asked by appellant. The law did not impose upon the appellee the duty of notifying the appellant that the rent was unpaid, and there was no evidence tending to show that he ought, under the facts of the case, have given such notice. Therefore instruction No. 2 asked by the appellant should have been, as it was, refused.

The effect of instruction No. 3, asked by appellant, was to relieve him of liability if he did not know or have notice that the rent was unpaid. He had notice of facts from which the existence of a lien for the rents arose. His purchase with such notice was at his peril, and it was not essential to a right of recovery that it should further appear that he knew or had notice that the rent had not been paid. Hence, that instruction was properly refused. We have read the evidence preserved in the record and find it sufficient to uphold the verdict. The judgment is affirmed.

Jane Fisher v. George Barnett and Charles F. Gray.

1. **MISTAKES—In Promissory Note.**—When the president and secretary of an incorporated company, in making a promissory note of the company for securing a debt owing by the company, by a mutual mistake of the parties execute the same so as to make it their own instead of the corporate obligation, a court of equity will reform the note so as to make it the undertaking and obligation of the company.

Memorandum.—In equity. In the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Bill to reform a promissory note; decree for complainants; appeal by defendants. Heard in this court at the November term, 1894, and affirmed. Opinion filed February 11, 1895.

APPELLANT'S BRIEF, WILLIAM A. YOUNG, ATTORNEY.

A court of equity has power to correct a mutual mistake, when it is made satisfactory that such mistake has been made, but proof must show that mistake is mutual. 1 Story's Equity, Secs. 155–157; Hamlin v. Sulivant, 11 App. 423; Ritchie v. Pease, 114 Ill. 353.

The evidence to show a mistake in a written instrument, in order to justify its correction and reformation, must be clear, strong and satisfactory. Nevins v. Dunlap, 33 N. Y. 672; Sapps v. Phillips, 92 Ill. 588; Peck v. Arehart, 95 Ill. 113; Emery v. Mohler, 69 Ill. 221; Palmer v. Converse, 60 Ill. 313; Goltra v. Sanasack, 53 Ill. 456; Sutherland v. Sutherland, 69 Ill. 482; Coffin v. Taylor, 16 Ill. 427; Oswald v. Sprehnle, 16 App. 368.

Equity is reluctant to grant relief for mistakes unless the parties can be placed in *statu quo*, and in this case, in order to do this, Barnett and Gray should tender back the money before they can ask any relief. Grymes v. Sanders, 93 U. S. Rep. 55; Encyclopedia of Law, 628, Note 2; McFerran v. Taylor, 7 U. S. (3d Cranch) 270.

In order that a mistake may come within the cognizance of a court of equity, it must appear by proper and sufficient allegations and proof, (1) that it is mutual; (2) uninten-

tional on the part of all parties; (3) free from negligence on the part of parties seeking the relief. 15 Am. and Eng. Ency. of Law, 631-632; Kerr on Fraud and Mistake (Bump's Addition) 365; Sutherland v. Sutherland, 69 Ill. 481; Bispham's Equity, Secs. 244 and 246; Bucks v. Holt, 74 Iowa 294; 1 Story's Eq. Juris., Sec. 152, *et seq.*; Shay v. Peters, 35 Ill. 360; Schwass v. Herschey et al., 125 Ill. 653; Wilson v. Byers, 77 Ill. 76.

To reform a written instrument on the grounds of an alleged mistake it must be one of fact and not of law. And the mistake must be clearly proven to be one of fact; a mere preponderance is not enough; and it must be mutual and common to both parties. Nevins v. Dunlap, 33 N. Y. 672; Beebe v. Swartwout, 3 Gill. 178; Wood v. Price, 46 Ill. 440; Oswald v. Spröehnle, 16 Ill. App. 368.

EVANS & BECKWITH, attorneys for the appellees.

MR. PRESIDING JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of the Circuit Court reforming a promissory note so as to make it read as the undertaking and obligation of the Sidell Creamery Company, a corporation, and not as that of the appellees, who were respectively president and secretary of the company, and restraining a suit at law against them jointly with the company.

The question of fact was mainly as to the intention of the parties. The note was given for money loaned by the appellant. It was alleged in the bill and we think sufficiently shown by the proof that the intention of the appellant was to loan the money to the corporation, and there is little reason to doubt that the appellees were acting solely on behalf of the corporation without any purpose or thought that they were personally responsible for the money.

It is not to be understood that the evidence is without conflict as to the intention and understanding of the appellant, for she testified with no little emphasis that she re-

garded the appellees as being bound for the money—and further that she regarded the members of the directory as responsible also. Her testimony is to some extent corroborated by that of Mrs. Dawson, who was present when the application for this loan was made. When all the evidence is considered, however, and in the light of the general situation of the parties and of the entire transaction, we are disposed to agree with the Circuit Court as to these propositions.

If the conclusion reached is correct there was a mutual mistake which ought to be corrected unless the appellees were guilty of *laches*, or unless some other consideration, effective in a court of equity, would bar the relief sought by the bill.

The appellees instructed one Spry, who was the book-keeper of the company, to prepare the note, and they signed it, as they testify, without observing the peculiar language employed. He testifies that he prepared it hastily, using a blank that happened to be convenient, and while intending to prepare a note of the corporation, he merely neglected, through haste, to insert the name of the corporation as the promisor in the body of the instrument. There can be no great doubt that all parties connected with the making and signing of the note supposed it was merely a corporate obligation—but it might, perhaps, be considered that they were somewhat careless in not more carefully scrutinizing the paper. Yet such mistakes and such want of care are very common, and where the rights of innocent third parties are not affected there can be no equitable reason for denying relief.

Manifestly every case must stand upon its own merits, and be determined by its peculiar facts. We are persuaded that in this case the decree is in accordance with the equitable rights of the parties, and it will therefore be affirmed.

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Joseph Chamberlain et al. v. The City of Litchfield.

1. **ORDINANCES—Proof of Publication.**—In the absence of any specific objection, the publication of an ordinance is sufficiently shown by a certificate of the clerk attached in the following form:

" STATE OF ILLINOIS, }
MONTGOMERY COUNTY, } ss.
CITY OF LITCHFIELD. }

I, W. L. Bateman, City Clerk of the City of Litchfield, in the county and State aforesaid, do hereby certify that the foregoing is a true and authentic copy of ordinance No. 649, entitled "An ordinance concerning misdemeanors in relation to animals upon improved streets," passed and approved May 4, A. D. 1893, recorded on page 143 of Records "D," of ordinances of said city, and that the same was duly published according to law.

In witness whereof I have hereto affixed my hand and the seal of said city this 23d day of April A. D. 1894.

[SEAL.]

W. L. BATEMAN, City Clerk."

2. **SAME—Boulevarded Streets—Validity.**—An ordinance providing that "it shall be unlawful for the owner of, or any person having control over any cow or cows, cattle, horses, mare or mule, to permit the same to run at large, or to drive or permit the same to be driven upon any of the public streets of the city along which the residents thereof shall have improved the same by the constructing in whole or in part, along and outside the sidewalks thereof, of grass plats, boulevards, or terraces, unless such cow or cows, horse, mare or mule shall be under the care and control of some competent person and secured by rope, halter, harness or other suitable and sufficient device to properly control the same," and imposing fines for its violation, is valid.

3. **VENUE—In Suits for the Violation of Ordinances.**—In determining the fact as to whether an act claimed to be a violation of an ordinance was committed within the limits of the municipality, courts will consider all the evidence in the case.

4. **SAME—May be Proved the Same as any Other Fact.**—It is not essential that an act claimed to be a violation of an ordinance should be shown to have been committed within the limits of the municipality by direct testimony; it may be shown by any competent proof.

5. **JUDICIAL NOTICE—Of what Courts take.**—Courts take judicial notice of the cities and villages of a county.

6. **QUESTION OF LAW—Device for Controlling an Animal.**—The question as to whether a stick or whip, in the hands of a driver, riding or walking behind a domestic animal, is such a "device" for controlling it as is contemplated by an ordinance prohibiting animals from being driven upon the public streets of a city, unless under the care and control of some competent person, and secured by rope, halter, harness or

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other suitable and sufficient device to properly control the same, is not one of fact for the determination of a jury, but of law for the court.

Memorandum.—Suit for a violation of an ordinance. In the Circuit Court of Montgomery County, on appeal from a justice of the peace. The Hon. ROBERT B. SHIRLEY, Judge, presiding. Trial by jury; verdict of guilty; appeal by defendants. Heard in this court at the November term, 1894, and affirmed. Opinion filed February 11, 1895.

APPELLANTS' BRIEF, LANE & COOPER, ATTORNEYS.

Before a conviction can be had it must appear affirmatively from the testimony that the act or offense must be proven to have been done within the territorial limits of the corporation. *Sattlee v. The People*, 59 Ill. 68; *Rice v. The People*, 38 Ill. 435; *Jackson v. The People*, 40 Ill. 405; *Mayor v. Nell*, 3 Yeates, 475; *Taylor v. Americus*, 39 Ga. 59; *Moore v. The People*, 150 Ill. 405; *Rice v. The People*, 38 Ill. 434; *Jackson v. The People*, 40 Ill. 405; *Sattler v. The People*, 59 Ill. 68; *Dougherty v. The People*, 118 Ill. 163.

APPELLEE'S BRIEF, JOHN P. GARDNER, ATTORNEY; MILTON M. CREIGHTON, OF COUNSEL.

The court will take judicial notice in this case that the city of Litchfield is in the county of Montgomery and State of Illinois. *Harding v. Strong*, 42 Ill. 148; *People, etc., v. Sappinger*, 103 Ill. 434; *Dougherty v. The People*, 118 Ill. 160.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

On a trial by jury upon appeal from a justice of the peace, appellants were found guilty of the violation of an alleged ordinance of the city of Litchfield, as follows:

Be it ordained, etc. Section 1. That after the 20th day of May, A. D. 1893, it shall be unlawful for the owner of, or any person having control over any cow or cows, cattle, horses, mare or mules, to drive or permit the same to be driven upon any of the public streets of the city, along which the residents thereof shall have improved the same by the

constructing in whole or in part along and outside the sidewalks thereof, of grass plats, boulevards or terraces, unless such cow or cows, horse, mare or mule shall be under the care and control of some competent person and secured by rope, halter, harness or other suitable and sufficient device to properly control the same.

Section 2 prescribes for its violation a fine of not less than three nor more than one hundred dollars.

When plaintiff's case in chief was closed, defendants moved the court to exclude the evidence and instruct the jury to find them not guilty, which was refused; and upon the rendition of the verdict of guilty, a motion for a new trial was also refused and judgment rendered imposing a fine of three dollars upon each and for the costs.

The evidence shows that in June, 1893, the defendants drove two fatted cows down Union avenue, a boulevarded street of Litchfield, to a slaughter house east of it; that Chamberlain rode a horse, leading another, and Simpson closely followed the cows, on foot, carrying in his hand only a stick; that the cows were loose, without a halter, rope or anything that could be called a device for properly controlling them, in any way attached to them, or, so far as appeared, in possession of the drivers; and that the cows did at times get upon the sidewalks and grass plats of the avenue.

The points urged against the judgment are that the ordinance was admitted in evidence without sufficient proof of its publication; that it was not a valid ordinance; that the venue was not proved; and that the court excluded all evidence offered to prove that defendants, from experience, were competent to drive, handle and control cattle; that these cows were actually under their control, were gentle and did not injure the walks or grass.

It is perhaps a sufficient answer to all of these except the one last stated, that to the introduction of the ordinance no specific objection was made.

The evidence so offered was a certified copy of the ordinance and the certificate thereto attached, which was as follows:

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STATE OF ILLINOIS, }
MONTGOMERY COUNTY, } ss.
CITY OF LITCHFIELD. }

I, W. L. Bateman, City Clerk of the City of Litchfield, in the county and State aforesaid, do hereby Certify that the foregoing is a true and authentic copy of ordinance No. 649, entitled "An ordinance concerning misdemeanors in relation to animals upon improved streets," passed and approved May 4, A. D. 1893, recorded on page 143 of records "D," of ordinances of said city, and that the same was duly published according to law.

In witness whereof I have hereto affixed my hand and the seal of said city, this 23d day of April, A. D. 1894.

W. L. BATEMAN,

City Clerk.

[SEAL.]

We think this, without specific objections, was *prima facie* evidence of its passage and due publication. *Lindsay v. Chicago*, 115 Ill. 120; *Moss v. Village of Oakland*, 88 Ill. 109.

Was the act here charged sufficiently shown to have been committed within the corporate limits of the city of Litchfield, in the county of Montgomery, and State of Illinois? It is claimed that this question is settled by the case of *Dougherty v. The People*, 118 Ill. 160. There the venue was Cook county, and the court said the witnesses "refer to streets" and localities by name, without indicating further, however, in what county or even in what city they are; nor do they mention any fact or circumstances showing by necessary inference that such street or localities must be in the city of Chicago, or elsewhere in Cook county." In the latter case of *Sullivan v. The People*, 122 Ill. 385, in speaking of the contention that it did not affirmatively appear that the offense was committed in that county, the court said it was a misapprehension of the evidence, and that when all of it was considered that fact did appear. "The prosecuting witness testified that she lived on Emerson avenue, formerly called Ashley street, and that the offense was committed in her house. One of the witnesses for the defense

testified that she lived near the prosecuting witness * * * and that she had lived on Emerson avenue twenty years and in Chicago twenty-seven." The necessary inference is that the period of her residence on Emerson avenue was included in the twenty-seven years she lived in Chicago, and hence that Emerson avenue must have been in Chicago. The court then proceeds: "This evidence, considered in connection with the affirmative fact which appears from the record, that the trial was had in Cook county, where it is alleged the offense was perpetrated, is sufficient to support the finding of the jury that the offense was committed in the county of Cook. Of course this court will take judicial notice that Chicago is in Cook county. Proof that a crime was committed in Chicago, is proof that it was committed in Cook county. On the whole record considered, not the slightest doubt remains that the offense of which defendant was convicted was committed in the county alleged in the indictment."

Here the record shows the case was tried before a justice of the peace, and on appeal in Montgomery county, the certificate of the city clerk shows Litchfield to be in that county in the State of Illinois. The testimony of the defendant, Chamberlain, is that they drove the cows down Union avenue, that they had a horse apiece "until they got up town," when Simpson dismounted, and they all testify that Union avenue is a paved and boulevarded street of Litchfield. Simpson had dismounted and they were on that avenue and up town when the offense was committed. It can not be doubted, upon all the evidence in the record, that it was within the corporate limits of the city of Litchfield, in the county of Montgomery and State of Illinois.

But it is further argued that the ordinance is void, because it "depends upon the will of the residents of any street whether they construct boulevards on such street or not, and therefore it depends upon their will whether the ordinance shall be a valid ordinance or not." This is the language of counsel. We think the inference is a *non sequitur*. It is not the validity but the application of the ordinance that so depends, and it is but the common case of laws regulating vol-

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untary action. *Guild v. City of Chicago*, 82 Ill. 476, and cases there cited. They are none the less valid or reasonable because they do not apply to those who do not choose to bring themselves within their provisions, nor because there may be some who can not. The protection of this ordinance is provided for and offered to the residents of all the streets of Litchfield alike and upon the same conditions. It was ordained by the proper authorities, and is either valid or invalid, whether the residents of all or of some only, or of none of the streets "will avail themselves of it." And we perceive nothing unreasonable in it.

As to the excluded evidence we hold that none of the facts sought to be proved thereby, nor all together, were material without proof; also that on the occasion in question the cows were secured by rope, halter, harness, or other suitable and sufficient device to properly control them. Manifestly, it was upon the understanding that no such proof was expected or intended to be made, that the evidence offered was objected to and the objection sustained. We further hold that whether a stick or whip in the hands of a driver, walking or riding behind them, was or was not such a "device" for controlling them as was contemplated by the ordinance, was not a question for the jury. If any other was expected to be shown, it should have been so stated to the court or the proof offered. Neither was done, nor has it been intimated here that any such proof would or could have been made; and if such was the fact, as we may now assume, the ruling was correct, and the judgment will be affirmed.

A. T. Doerr v. Henry Brune.

1. EVIDENCE—*Admissions of a Party*.—Admissions of parties are competent evidence against them. How much they are worth, is a question for the jury.

2. INSTRUCTIONS—*Must Not Invade the Province of the Jury*.—It is the province of the court to instruct as to the law only, and not to invade

the province of the jury as to the facts by any intimation as to the credibility of the witnesses, or the weight of the evidence, or by assuming that a fact in controversy has been proved.

3. *TENDER—May be Withdrawn.*—A tender in an action at law is merely a defense, and to be effective it must be kept good. It may be withdrawn at any time before it is accepted.

4. *ADMISSIONS—When Competent.*—Upon the trial of an issue, as to whether a person contracted to work for three or for four months, an admission by the party that he hired until the threshing season opened, is competent as tending to show that he quit the service before the expiration of his time.

Memorandum.—*Assumpsit.* In the Circuit Court of Montgomery County; on appeal from a justice of the peace; the Hon. ROBERT B. SHIRLEY, Judge, presiding. Trial by jury; verdict and judgment for plaintiffs; appeal by defendant. Heard in this court at the November term, 1894. Reversed and remanded. Opinion filed February 11, 1895.

APPELLANT'S BRIEF, LANE & COOPER, ATTORNEYS.

An instruction should not invade the province of the jury by directing them what weight should be given to the testimony of any witness. *Wickersham v. Beers*, 20 Ill. App. 247; *Westbrook v. Howell*, 34 Ill. App. 574; *Kelly v. L. & N. R. R. Co.*, 49 Ill. App. 304; *Hartley v. Lybarger*, 3 Bradw. 524; *Dufield v. Cross*, 12 Ill. 397; *Frizzell v. Cole*, 29 Ill. 465; *Ayers et al. v. Metcalf et al.*, 39 Ill. 310; *Straubler et al. v. Mohler et al.*, 80 Ill. 24; *Manro v. Platt*, 62 Ill. 450.

AMOS MILLER, attorney for appellee.

MR. PRESIDING JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This was a suit commenced before a justice of the peace, and was removed by appeal to the Circuit Court where the plaintiff recovered a judgment for \$45; from which the defendant has appealed to this court. The cause of action was the wages of the plaintiff's minor son, and the question in dispute was whether the employment was for a term of three or four months, the defendant asserting the latter and the plaintiff the former, there being no dispute that the son had ceased to work at the end of three months without con.

sent of defendant and without cause other than that the time contracted for had expired. From the evidence, as it appears in the record, it would seem that, to say the least, the case was very close on this point. It is assigned as error that the court gave the following instruction at the instance of the plaintiff:

“The court instructs the jury that although parol proof of the verbal admissions of a party to a suit, when it appears that the admissions were understandingly and deliberately made, often afford satisfactory evidence, yet, as a general rule, the statements of a witness as to the verbal admissions of a party should be received by the jury with great caution, as the kind of evidence is subject to much imperfection and mistake. The party himself may have been misinformed, or may not have clearly expressed his meaning, or the witness may have misunderstood him; and it frequently happens that the witness by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party did actually say. But it is the province of the jury to weigh such evidence and give it the consideration to which it is entitled, in view of all the other evidence in the case.”

The effect of this instruction was to discredit the testimony of the witness, Cary, and of the defendant as to conversation at the plaintiff's place of business shortly after the son had quit work, and the plaintiff had written a letter to the defendant demanding payment and threatening suit if the demand was not complied with.

The defendant and Cary went to see the plaintiff and the defendant produced the letter, and a conversation ensued in which the alleged admissions were made. The proposition contained in the instruction is not a rule of law. Admissions of parties are competent evidence against them. How much they are worth is for the jury. It is no doubt common experience that they are generally not entitled to great weight for some or all of the reasons suggested in the instruction, but that is not a matter of law to be given to the jury. In this instance we see nothing to justify the

suspicion that these admissions were unworthy of credit for any of the causes named. The witness, Cary, and defendant, evidently went for the express purpose of discussing the question in dispute with the plaintiff, and if they were truthful in relating the conversation their testimony on that point should have had considerable weight.

The whole case, so far as it was in dispute, rested upon what was said by the plaintiff and defendant and by the son at various times. The plaintiff's case depended on the conversation that occurred when the contract of hiring was made, for it was all verbal. Why should what the plaintiff and his son testified as to that conversation be better remembered and more accurately told, that what was said in the conversation when Cary was present? At least why should the jury be advised that there is occasion for more care in considering the testimony as to the latter than in considering the testimony as to the former?

It is the province of the court to instruct as to the law only (par. 52 of the Practice Act); hence it has been frequently held that the court should not invade the province of the jury as to the facts by any intimation as to the credibility of the witnesses or the weight of the evidence, or by assuming that a fact in controversy has been proved. The instruction in question was directly condemned in *Wickersham v. Beers*, 20 Ill. App. 243; and in several other cases in the Supreme and Appellate Court Reports cited by counsel, the ruling has been with more or less directness to the same effect. No doubt it might be proper to call the attention of the jury to some of the elements or considerations which affect the value of testimony adduced as to the verbal declarations or statements of parties, whether constituting the original contract or a subsequent version of it, but care should be taken to avoid any intimation as to whether those to which the instruction applies are weak or strong in any respect, and especially there should be nothing that might appear to discriminate in favor of or against any particular class of such proof.

We are of opinion that this instruction was erroneous

Norton v. Brophy.

when applied to the proof before the jury, and that it may have operated unduly to the prejudice of the defendant.

It is urged also that the court erred in refusing leave to the defendant to withdraw his tender of \$35. The answer of appellee to this point is that the record does not show that such a tender had been made or maintained. It appears from an instruction given by the court on its own motion that there was a tender and that it had been kept good for the sum of \$35, and that the plaintiff was entitled to recover to that amount. No reason is suggested why the tender may not be withdrawn before accepted. It is merely a defense, and to be effective must be kept good.

A defendant may generally withdraw any or all of his defense. It is further urged that the court erred in refusing proof offered by the defendant as to when the threshing season began that year in that vicinity.

There was some proof tending to show that the plaintiff admitted that the boy was hired until the threshing season opened, and the evidence referred to was for the purpose of showing that he quit work before that point of time had arrived.

We are inclined to think this evidence was competent and should have been admitted.

The judgment will be reversed and the cause remanded.

Daniel Norton v. Catherine Brophy.

58 661
90 495
91 855

1. WRITTEN INSTRUMENTS—*Construction of.*—A written instrument may be construed most strongly against the maker of it, and if necessary to render it intelligible, a word necessarily implied by the context may be supplied, or rejected, if its omission is likewise necessarily implied.

2. LIMITATIONS—*What Instruments Are Within the Statute.*—The following instrument—

"BLOOMINGTON, ILL., March 17, '87.

To the bearer of Catherine Brophy, \$212.00 dollars of

DANIEL NORTON"—

is such a written admission as is evidence of indebtedness within the meaning of the statute of limitations.

Memorandum.—*Assumpsit.* In the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding. Declaration, special and common counts; judgment for plaintiffs on demurrer to plea of the statute of limitations; appeal by defendant. Heard in this court at the November term, 1894, and affirmed. Opinion filed February 11, 1895.

Copy of the plea of the statute of limitations:

And for a further plea in this behalf the defendant says that the plaintiff ought not to have her aforesaid action against him, the defendant, because he says that the several supposed causes of action in said declaration mentioned did not, nor did any of them or either of them accrue to the plaintiff at any time within five years next before the commencement of this suit, in manner and form as the plaintiff has above complained against him, the defendant, and this the defendant is ready to verify, wherefore he prays judgment, if the plaintiff ought to have her aforesaid action against him, etc.

APPELLANT'S BRIEF, FRANK R. HENDERSON AND JOHN E. POLLOCK, ATTORNEYS.

To constitute a promissory note there are certain indispensable requisites:

A promissory note is a written promise to pay to a certain person, or to the order of a certain person, or to bearer, a sum certain of money absolutely.

It is generally laid down that a promise must be express. The mere fact that a debt is acknowledged is not enough, and the word promise, or its equivalent, must be used. Bigelow on Bills and Notes, 6, 11, 12; Daniel on Negotiable Instruments, 4th Ed., Vol. 1, p. 39, Par. 28, and p. 44, Par. 36.

For a writing to be a due bill it must contain an acknowledgment of the debt. Daniel on Negotiable Instruments, 4th Ed., Par. 36a to Par. 40, Vol. 1, p. 45.

A writing to be by virtue of itself an obligation for the payment of money, must contain a promise to pay, or an acknowledgment of such indebtedness. S. & C. Stat., Chap. 98, Par. 3.

APPELLEE'S BRIEF, ROWELL, NEVILLE & LINDLEY,
ATTORNEYS.

The following instrument has been held to be an evidence

Norton v. Brophy.

of indebtedness in writing under our statutes and negotiable:

“ Good for 50 cents.

H. C. MYERS, Sut.”

Which was indorsed in the handwriting of Myers, “H. C. M.” Charles W. Weston et al. v. Henry C. Myers, 33 Ill. 424.

A certificate of deposit in a bank is a sufficient evidence in writing of the existence of a debt to save the cause of action until barred by the statute of limitations relating to written instruments. First National Bank v. Amanda F. Coleman, 11 Brad. 509; Jasoy & Co. v. Horn, 64 Ill. 379.

Entries of a deposit by a bank in a depositor's bank book are evidence in writing of indebtedness and an action thereon is not barred by the five years' statute of limitation. Jasoy & Co. v. Horn, 64 Ill. 379; Schalucky v. Field, 124 Ill. 617.

Words omitted in a note which are plainly inferable from the remaining language will be considered the same as if not omitted. Beardsley v. Hill, 61 Ill. 354; Massie v. Belford, 68 Ill. 290.

MR. JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

The action below was assumpsit by appellee against the appellant upon the following instrument, viz.:

BLOOMINGTON, ILLS., March 17, 1887.

To the bearer of Catherine Brophy \$212 dollars of

DANIEL NORTON.

Whether the instrument was evidence of indebtedness in writing within the meaning of Sec. 16, Chap. 83, R. S., entitled “ Limitations,” is the sole question. The appellant executed and delivered it to the appellee. It was designed to serve some purpose and was delivered and accepted as accomplishing that purpose. As it was written by the appellant, we are at liberty to construe it most strongly against him (2 Parsons, Contracts, 506; Massac v. Belford, 68 Ill. 290), and if necessary to render it intelligible may supply a word necessarily implied by the context (Booth v. Wallace, 2 Roach Con. 247, cited with approval in Beards-

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ley v. Hill, 61 Ill. 354), or may reject a word if its omission is likewise necessarily implied. Bailey on Bills, Chap. 1, Sec. 2, p. 6. The application of these rules of construction leaves no doubt as to the effect which ought to be given to it. It is readily seen to be a written statement of the appellant that the appellee or the bearer of the writing is to receive of or from him the sum of money mentioned therein. Such a written admission is evidence of indebtedness within the meaning of the statute in question. *Weston v. Myers*, 33 Ill. 424; *Jassoy v. Horn*, 64 Ill. 379.

The judgment is affirmed.

T. F. Weaver v. Third National Bank of Bloomington.

1. **JUDGMENTS**--*Liens and Priorities*.—The lien of judgments rendered at the same term of court is, under Sec. 1, Ch. 77, R. S., entitled, "Judgments and Executions," concurrent, but at common law, where judgments are equal, the judgment creditor who first has execution issued and levied is entitled to a priority in the proceeds of the sale of the property levied upon, as a reward for his diligence.

2. **SAME**—*Common Law Priorities Abridged*.—Under Sec. 13, Ch. 77, R. S., entitled, "Judgments and Executions," the power to secure a priority is abridged, so that where property is sold under an execution issued upon one of several judgments rendered against the same parties at the same term of court, it is sold for the benefit of all executions issued upon such judgments and delivered to the sheriff before the sale, and the proceeds are to be divided *pro rata* according to the several amounts.

3. **JUDGMENT CREDITORS**—*Equality Under the Statute*.—In order to secure equality under the statute, it is incumbent upon judgment creditors to lodge in the hands of the sheriff, executions upon their judgments, before sales are made under other executions issued in favor of other creditors upon judgments recovered at the same term of the court.

4. **EXECUTIONS**—*After the Return Day*.—An execution has no vitality after its return day, though not in fact returned.

Memorandum.—In equity. Appeal from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the November term, 1894. Reversed and remanded. Opinion filed February 11, 1895.

STATEMENT OF THE CASE.

On the 18th day of March, 1893, being one of the judicial days of the February term, 1893, of the McLean Circuit Court, appellant obtained a judgment for \$2,575.60 against T. D., A. W. and H. H. Peasley, partners as Peasley & Co., upon which an execution was on that day issued and placed in the hands of the sheriff. Afterward, on the same day, he obtained another judgment against the same parties and Hannah Peasley, for \$1,549.40, and execution was also issued upon it and delivered to the sheriff. Afterward, in same court and at the same term, but two days later, on March 20th, the Third National Bank of Bloomington, Ill., the appellee, obtained a judgment for \$3,280.62 against the same parties and also against Hannah Peasley, and an execution upon it was on that day issued and placed in the hands of the sheriff. All these executions were levied on the personal property of the firm of Peasley & Co., but were not levied on any land of the firm, of the individuals, or of Hannah Peasley.

On March 23, 1893, Peasley & Co., who had been engaged in manufacturing machinery in Bloomington, Ill., filed a bill for the appointment of a receiver, making the appellee and the appellant defendants, and by agreement an order was made appointing a receiver to take charge of, sell, and dispose of the property of the firm of Peasley & Co. The goods levied on by the sheriff were turned over to the receiver and the rights of the execution creditors thereon preserved by agreement of the parties and the order of the court.

There was no receiver appointed for the property of the individual members of the firm. On August 30, 1893, all of the property of the firm had been sold, and enough to pay appellant's first judgment had not been realized. The execution on appellant's second judgment was then returned and a new one issued on the first day of September, 1893, by virtue whereof the sheriff levied on the real estate of the individual members of the firm and of Hannah Peasley, the proceeds of which are in controversy in this suit. The sheriff, after duly advertising, sold the land on November 28, 1893,

appellant becoming the purchaser for the amount of his judgment, interest and costs, \$1,653.52, and a certificate of purchase was issued to him. At the time of the sale there was no other execution in the sheriff's hands except the one dated March 18, 1893, issued on the first judgment rendered in favor of appellant, and one dated March 20, 1893, which was issued upon the judgment in favor of appellee.

The appellee filed a petition in the case in which the receiver was appointed, claiming a priority over appellant's judgment on all the property of the firm and of the individuals. A demurrer was sustained to the petition, except in so far as it related to the adjustment of priorities on the property of the individuals. Exceptions to this ruling were not taken and preserved, nor has the appellant filed cross-errors in this court so that no question as to the correctness of the action of the court in this respect is presented here. Appellant was ruled to answer the petition so far as the demurrer did not apply, which he did by setting up the facts as herein above set out, and claiming that by the sale under his execution on November 28, 1893, he had gained a priority over the bank.

A stipulation of facts was then entered into and the cause submitted to the court thereon. The court held that all three of the judgments were equal liens on the land sold and should share *pro rata* in the proceeds, and ordered appellant to pay the sheriff \$690 as the *pro rata* share of the appellee in twenty days, and setting the sale aside in case of default. From this decree Weaver appealed to this court.

APPELLANT'S BRIEF, EDWARD BARRY, ATTORNEY.

The doctrine regarding individual and partnership debts, and payment of same out of individual and partnership funds respectively, only relates to the rights of creditors after dissolution, and to property undisposed of and to which prior liens have not attached. After a creditor of a firm obtains judgment, it can not be insisted that individual creditors shall be first paid out of the individual property. *Reeves, S. & Co. v. Ayres*, 38 Ill. 418; *Hapgood v. Cornwell*, 48 Ill. 64; *McIntyre v. Gates*, 104 Ill. 502; *Doggett v. Dill*,

108 Ill. 569; Preston v. Colby, 117 Ill. 483; Am. & Eng. Enc., Vol. 17, p. 1210.

The judgments having been rendered at the same term of court, the liens were equal and no priority. At common law, or perhaps more properly Statute of Westminster 2, when the liens of judgments were equal, he who first had execution issued and levied, obtained a priority. Every court which has been called to pass upon the question has so held. Smith v. Lind, 29 Ill. 24; Elston v. Castor, 101 Ind. 436; Rockhill v. Hanner, 15 How. (U. S.) 189; Lowry v. Reed, 89 Ind. 442; Michaels v. Boyd, 1 Carter (Ind.) 259; Adams v. Dyer, 8 Johns. (N. Y.) 347; Waterman v. Haskin, 11 Johns. (N. Y.) 228; Johnson v. Wilson, 40 Iowa 425; Bliss v. Watkins, 16 Ala. 229; Shirley v. Brown, 80 Mo. 224.

The lien of an execution, except as to property levied on, ceases with the return day of the writ. After that time, when no levy has been made, the writ, whether returned by the officer or held in his hands, is *functus officio* and has no validity whatever. Lountz v. Gross, 16 Ill. App. 329; Corbin v. Pearce, 81 Ill. 461; Bowen v. Parkhurst, 24 Ill. 258; Faull v. Cooke, 19 Ore. 455; Freeman on Executions, Secs. 202-3.

APPELLEE'S BRIEF, FIFER & PHILLIPS, ATTORNEYS.

The rule is that joint debts are entitled to priority of payment out of the joint estate, and separate debts out of the separate estate. This rule is founded, not upon the equities of the creditors, but upon the equities of the partners. Each partner has the equitable right to have partnership debts paid out of the partnership estate, in the first instance, so that his individual property may be retained. In like manner, the members of the firm have each an equitable right to have the individual property of each partner first exhausted, in payment of the individual debt, in order to exempt the joint estate, as far as possible, from seizure for individual debts. Hanford v. Prouty, 133 Ill. 339; Story on Part., Sec. 376; Story's Eq. Jur., Sec. 675; Snell's Eq., 419; Parsons on Part., 480; 1 Bates on Part., Sec. 559; Straus v. Kernwood, 21 Gratt. (Va.) 384, 591.

Firm creditors whose debts have not been reduced to judgment have no specific lien, either legal or equitable, upon property of either the firm or of the individual partners, and their rights to have the firm assets so marshaled as to satisfy their debts first, can only be worked out through the equities of the partners. *Waterman v. Hunt*, 2 R. I. 298; *Shackelford v. Shackelford*, 32 Gratt. (Va.) 481; *Cookley v. Weil*, 47 Ind. 277; *Upton v. Arnold*, 19 Ga. 190; *Case v. Beauregard*, 99 U. S. 119; *Fitzpatrick v. Flannagan*, 106 U. S. 648; *Huiskamp v. Moline Wagon Co.*, 121 U. S. 311; *Ex parte Williams*, 11 Ves. 3; *Ex parte Ruffui*, 6 Ves. 119.

The law does not recognize the creditor of a firm as having a superior equity to that of the individual creditor for payment from the partnership assets. It recognizes, however, that the members of the partnership have a superior lien on the partnership property for the payment of the firm debts, and allows the creditors to avail themselves of this lien to the exclusion of individual creditors, when it has not been surrendered by the partners. *Hapgood v. Cornwall*, 48 Ill. 64; *Singer v. Carpenter*, 125 Ill. 117; *Union Nat. Bank v. Bank of Commerce*, 94 Ill. 271; *McIntire v. Yates*, 104 Ill. 491; *Morrison v. Kurtz*, 15 Ill. 193; *Adams v. Sturges*, 55 Ill. 472; *Rainey v. Nance*, 54 Ill. 29; *Story on Part.*, Secs. 360-364; *Story on Part.*, Secs. 322-326.

The equity of this rule, on the other hand, equally requires that partnership creditors can only look to the surplus, if there be any, of the separate estates of the partners, after payment of the separate debts. The individual creditors take the separate and private estate in preference to the partnership creditors. *Hanford v. Prouty*, 133 Ill. 339; *Moline Water Works v. Webster*, 26 Ill. 233; *Pohlman v. Graves*, 26 Ill. 405; *Union Nat. Bank v. Bank of Commerce*, 94 Ill. 271; *Murrill v. Neill*, 8 How. (U. S.) 414; *Meyer v. Thornburgh*, 15 Ind. 124; *Walker v. Eyth*, 25 Pa. St. 216; *Greene v. Greene*, 45 N. J. Eq. 738; *Ridgeway v. Clare*, 19 Beav. 111.

In this case the Third National Bank took judgment

against the partnership and also against the individuals, T. F., A. W., and H. H. Peasley, and Hannah Peasley, thus having a legal lien on the separate estate of the parties named, which can not be superseded by a partnership creditor. *Wisham v. Lippincott*, 1 Stockt. (N. J.) 353; *Randolph v. Daly*, 16 N. J. Eq. 313; *National Bank v. Sprague*, 20 N. J. Eq. 15; *Howell v. Teel*, 29 N. J. Eq. 490.

So when the Third National Bank, by virtue of its judgment and execution, acquired a lien upon the separate estate of the partners, it obtained a legal advantage of which it can not be deprived by other partnership creditors. It has the prior statutory lien, the legal validity of which can not be questioned. *Straus v. Kerngood*, 21 Gratt. (Va.) 584, 588.

And having thus acquired a legal right to satisfaction from the estate of the debtors, it is impossible to take that estate from it and appropriate it to another creditor, without a judicial repeal of the statute. *Straus v. Kerngood*, 21 Gratt. (Va.) 584, 590.

A legal lien obtained by a partnership creditor, whether upon partnership property or separate property of the partners, will be recognized and enforced, where such lien consists of a judgment and levy at law. *Averill v. Loucks*, 6 Barb. (N. Y.) 470; *Bowker v. Smith*, 48 N. H. 111; *Kuhne v. Law*, 14 Rich. (S. Car.) 18; *McDermott v. Strong*, 4 Johns. Ch. (N. Y.) 687; *Hosack v. Rogers*, 8 Paige (N. Y.) 229.

Or if it be a mechanic's lien. *Rainey v. Nance*, 54 Ill. 29, 35.

Or if it be attachment. *Allen v. Well*, 22 Pick. (Mass.) 450.

Or decree of equity. *Terhune v. Colton*, 1 Beas. (N. J.) 312; *Woddrop v. Price*, 3 Desauss. (S. Car.) 203; *Foster v. Barnes*, 81 Pa. St. 377.

At law, joint creditors may pursue the joint and separate estate to the extent of each, for the satisfaction of their joint demands which are at law considered both joint and several, without the possibility of the interposition of any restraining power of a court of equity. *McCulloh v. Dash-ell*, 1 Har. & G. (Md.) 96, 105.

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So the Third National Bank, by virtue of its judgment, may proceed to collect the amount due upon levy and sale, under the execution against the separate property of the individuals; and is at law not to be restrained from doing so on the ground that the debt is a partnership debt, and there is partnership property out of which it may collect the amount due. *Wisham v. Lippincott*, 2 Stockt. (N. J.) 353; *Randolph v. Daly*, 16 N. J. Eq. 313; *National Bank v. Sprague*, 20 N. J. Eq. 13; *Howell v. Teel*, 29 N. J. Eq. 490; *Meech v. Allen*, 17 N. Y. 300; *Cleghorn v. Insurance Bank of Georgia*, 9 Ga. 319; *Kirby v. Schoonmaker*, 3 Barb. Ch. (N. Y.) 46; *Allen v. Wells*, 22 Pick. (Mass.) 450; *Straus v. Kerngood*, 21 Gratt. (Va.) 584; *Davis v. Howell*, 33 N. J. Eq. 72; 34 N. J. Eq. 292.

Having a prior lien upon the property of the individual partners, its rights are paramount to all other creditors. *Straus v. Kerngood*, 21 Gratt. (Va.) 584, 588; *Wisham v. Lippincott*, 1 Stockt. (N. J. Eq.) 353; *Randolph v. Daly*, 16 N. J. Eq. 313; *National Bank v. Sprague*, 20 N. J. Eq. 15; *Howell v. Teel*, 29 N. J. Eq. 490; *McColloh v. Dashiell*, 1 Har. & G. (Md.) 96, 105.

MR. JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

The lien of judgments rendered at the same term of court is, under our statute, concurrent; neither has priority; Sec. 1, Chap. 77, R. S., Judgments, etc. At common law where judgments were equal the judgment creditor who first had execution issued and levied, as a reward for his diligence obtained a priority in the proceeds of the sale of the property levied upon. *Smith v. Lend*, 29 Ill. 24; *Freeman on Executions*, Sec. 203. The common law right to thus secure priority was to some extent abridged by the enactment of the 13th section of said chapter 77 of R. S., which is as follows:

"13. When the lien of several judgments is concurrent by reason of the same having been rendered at the same term of court or on the same day in vacation, and execution issued upon any one of such judgments is levied upon prop-

erty subject to such lien, the property so levied upon shall be sold for the benefit of all executions issued upon such judgments, and delivered to the same officer or any of his deputies before sale; and the proceeds of such sale shall be divided upon the several executions *pro rata*, according to their several amounts."

This section was enacted to enable the other judgment creditors or such of them as would comply with its provisions to secure equal priority with the creditor who by reason of his diligence was more favored than they by the existing rule of the common law. In order to secure this equality it is, however, incumbent upon them to comply with the requirements of the statute, that is, to lodge in the hands of the sheriff executions upon their judgments before sale was made under the executions issued by the more vigilant creditor. Otherwise the proceeds of the sale would be first applied to the discharge of the more favored judgment according to the course of the common law. The trial court held that the appellee complied with this statute and became entitled to share *pro rata* in the proceeds of the sale of the land. In this we think the court erred. The sale was made November 28, 1893. The sheriff then had in his hands only one valid execution, the one issued September 1, 1893, upon the judgment rendered in favor of the appellant. He still held possession of the execution that the appellee had caused to be issued on its judgment on the 20th day of March, 1893, but it was *functus officio*. "An execution," it was said in *Corbin v. Pearce*, 81 Ill. 461, "has no legal effect as such after its return day; the writ, whether returned by the officer or held in his hands, has no vitality whatever." The 13th section before quoted provided a way by which the appellee might have become entitled to share *pro rata* with the appellant in the proceeds of the sale of the land but it failed to avail itself of it. The appellant was entitled to the advantage awarded by the law to the diligent and it was error to deprive him of it. No other question is presented by the record. The order and judgment of the Circuit Court is reversed and the cause remanded for further proceeding in conformity with the views expressed herein.

REVISED RULES
—OF THE—
APPELLATE COURT OF ILLINOIS,
FOURTH DISTRICT.*

ADOPTED AUGUST, 1894.

WRIT OF ERROR—SUPERSEDEAS.

RULE 1. Supersedeas—Practice — Bond—Affidavit.—
No *supersedeas* will be granted unless a transcript of the record on which the application is made be complete, and so certified by the clerk of the court below, with an assignment of errors written on or appended to the record. Nor will the *supersedeas* issue until the bond be filed with the clerk according to the order granting the *supersedeas*. And on every application for a *supersedeas*, an abstract of the record, with a brief, containing the points and authorities relied upon, and pointing specifically to those portions of the record upon which the alleged errors arise, shall be presented with the record to the court or justice to whom the application is made. Every such application, whether made in open court, or to a justice in vacation, must be accompanied by an affidavit showing the solvency of the proposed surety.

* At a term of the Appellate Court of Illinois for the Fourth District, begun and held at Mount Vernon, Illinois, Tuesday, August 28, 1894. ORDERED: That all rules of practice heretofore adopted by this court be, and the same are hereby annulled; and the following rules be and the same are hereby adopted in lieu thereof, which the clerk will spread upon the minutes.

RULE 2. Bond Executed by an Attorney in Fact.—Whenever a bond is executed by an attorney in fact, the clerk shall require the original power of attorney to be filed in his office, unless it shall appear that the power of attorney contains other powers than the mere power to execute the bond in question; in which case the original power of attorney shall be presented to the clerk, and a true copy thereof filed, certified by the clerk to be a true copy of the original.

RULE 3. Writ of Error Made a Supersedeas.—When a writ of error shall be made a *supersedeas*, the clerk shall indorse upon said writ the following words: "This writ of error is made a *supersedeas*, and is to be obeyed accordingly," and he shall thereupon file the writ of error with the transcript of the record, in his office. Said transcript shall be taken and considered as a due return to said writ, and thereupon it shall be the duty of the clerk to issue a certificate, in substance as follows, to wit:

OFFICE OF THE CLERK OF THE APPELLATE COURT FOR }
THE FOURTH DISTRICT OF THE STATE OF ILLINOIS. }

I do hereby certify that a writ of error has issued from this court for the reversal of a judgment obtained by.....vs.....in theCourt of.....at the.....term, A. D. 18.., in a certain action of.....which writ of error is made a *supersedeas*, and is to operate as a suspension of the execution of the judgment, and as such, is to be obeyed by all concerned.

Given under my hand and seal of the said Appellate Court, at Mt. Vernon, this.....day of.....A. D. 18..

.....Clerk.

RULE 4. Writ of Error—Direction—Commands and Return.—Writs of error shall be directed to the clerk of the court in which the judgment or decree complained of is entered, commanding him to certify a correct transcript of the record to this court; but where the plaintiff in error shall file in the office of the clerk of this court a transcript of the record duly certified to be full and complete, before a writ of error issues, it shall not be necessary to send such writ to the clerk of the inferior court, but such transcript shall be taken and considered as a due return to said writ.

RULE 5. Process on Writs of Error—Commands—Alias—Pluries.—The process on writs of error shall be a

Rules of Practice.

scire facias to hear errors, issued on the application of the plaintiff in error to the clerk, directed to the sheriff or other officer of the proper county, commanding him to summon the defendant in error to appear in court and show cause, if any he have, why the judgment or decree mentioned in the writ of error shall not be reversed. If the *scire facias* be not returned executed, an *alias* and *pluries* may issue without an order of court.

RULE 6. Return Day—Entry of Appearance—Notice to Plaintiff.—The first day of each term shall be return day for the return of process, and no party shall be compelled to answer or prepare for hearing unless the *scire facias* shall have been served ten days before the return day thereof; nor shall a defendant be at liberty to enter his appearance and compel the plaintiff to proceed with the cause, unless the defendant shall have given the plaintiff ten days notice, before the term, of his intention to enter his appearance, and have the cause proceed to a hearing.

RULE 7. Writ of Error Made a Supersedeas—Scire Facias to Hear Errors.—In all cases in which a writ of error is made a *supersedeas*, the plaintiff in error shall, on filing the record with the clerk, at the same time order and direct a *scire facias* to issue to hear errors, and shall use reasonable diligence to have the same served ten days before the first day of the term to which the writ of error is made returnable; on failing to do so, the defendant in error shall have the right to a hearing at the same term after joining in error, without giving ten days notice as required by Rule 6; *Provided*, if there be not ten days between the allowance of the *supersedeas* and the sitting of the court, the cause shall stand continued until the next term, unless by consent of the parties it shall be otherwise ordered.

NOTICE TO PURCHASERS AND TERRE-TENANTS.

RULE 8. Names to be Suggested—Ten Days Notice.—In all cases wherein guardians, executors or administrators, or others acting in a fiduciary character have obtained an order or decree for the sale of lands in causes *ex parte*, and a

sale has been had under such decree or order, and the same shall be brought to this court for revision, the purchaser or *terre-tenants* of such lands, if known, shall be suggested to the court by affidavit of the plaintiff in error, and notice given them of the pendency of the writ of error, ten days before the first day of the term of court to which the writ of error is returnable, so that said *terre-tenants* may appear and defend.

RECORDS OF INFERIOR COURTS.

RULE 9. How Prepared.—Hereafter, the clerks of the inferior courts in this State, in cases of appeal and of error, in making up “an authenticated copy of the records of the judgment appealed from,” or in sending up a transcript of the record to this court as a return to a writ of error, shall certify to this court: *First*—A copy of the process; *Second*—The pleadings of the parties, respectively; *Third*—The verdict in jury trials; *Fourth*—The judgment of the court below, whether tried by the court or jury; *Fifth*—All orders in the same cause made by the court; *Sixth*—The bill of exceptions; and *Seventh*—The appeal bond in cases of appeal. And in no case shall the said clerk insert in such transcript any affidavit, account, or other document or writing, or other matter, which, according to the decisions of this court, have been held to constitute no part of the record of a cause. This rule shall not extend to appeals or writs of error in chancery or criminal causes.

RULE 10. Arrangement of the Record.—The clerk of the court below shall arrange the several parts of the record aforesaid according to their chronological order. The clerk of this court shall not tax as costs in this court any matter inserted in such transcript contrary to the rule.

RULE 11. Direction by Præcipe.—The party or his attorney may, by *præcipe*, indicate to the clerk, and direct what of the files of the cause shall be copied into the record; and, in such case, if the record shall be insufficient, it shall be supplied at his costs, and, if unnecessarily voluminous, he shall pay the costs accrued on account of the copying of such unnecessary matters.

Rules of Practice.

TIME FOR FILING RECORDS.

RULE 12. Hearing Docket—What Causes to be Placed On.—No case brought to this court by appeal shall be placed on the court docket for hearing, unless the record is filed within the time now prescribed by law (see Sec. 73, Chap. 110, Practice Act), or within the further time allowed by the court for filing the record, except in extraordinary cases; the court, upon special application, may order a cause to be placed on the hearing docket.

RULE 13. Writ of Error—When Record to be Filed.—No case which may be brought to this court on writ of error shall be placed on the court docket for hearing, unless the record shall be filed on or before the second day of the term, or within such further time as may be allowed by the court for filing the same, except in extraordinary cases; the court, upon special application, may order a cause to be placed upon the hearing docket.

REMOVING RECORDS.

RULE 14. Records Not to be Removed Unless Upon Special Leave.—No person shall remove from the office of the clerk any record of this court, except upon special leave granted for that purpose. No record shall be taken from the files of the court except on application therefor to the clerk or his deputy; and it is made the duty of the clerk to report promptly to the court every violation of this rule. The clerk shall be held responsible for the safe keeping and production of the records. Application for leave to remove records may be considered at any time in the discretion of the court.

ASSIGNMENT OF ERRORS.

RULE 15. Errors to be Assigned on Filing Record.—The appellant or plaintiff in error shall, in all cases, assign errors at the time of filing his record in this court, and, on failing to do so, the case may be dismissed; but other errors may be assigned after the filing of the record, by leave of the court. The appellee or defendant in error shall have the

right to assign cross-errors within two days after the record is filed in this court, and not afterward without special leave of the court. *The assignment of errors and cross-errors must be written upon or attached to the record.*

TIME TO PLEAD.

RULE 16. Pleas—When to be Filed.—In all cases in this court where the defendant in error or appellee desires to plead and not join in error, he shall file his plea in the office of the clerk at least five days before the cause stands for trial, and the issue thereon must be made up before the day the cause stands for trial.

AGREED CASES.

RULE 17. Affidavit of Good Faith.—No judgment will be pronounced in any agreed case placed upon the records of this court, unless an affidavit shall be filed setting forth that the matters presented by the record were litigated in good faith about a matter in actual controversy between the parties, and that the opinion of this court is not sought with any other design than to adjudicate and settle the law relative to the matter in actual controversy between the parties to the record.

MOTIONS.

RULE 18. Motions, When to be Made.—Motions may be made on the opening of court each day, immediately after the decisions of the court are announced, but at no other time, unless in case of necessity, or in relation to a cause when called in course. Motions for orders of course will be entered by the clerk with orders of course entered thereon, viz: For hearing, taking under advisement, entering decisions thereon and such other matters, so that a perfect record may be kept of each step in the cause.

RULE 19. Special Motions to be in Writing.—All special motions shall be in writing and filed with the clerk, together with the reasons in support thereof, on the day before they shall be submitted to the court. Objections to

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motions must also be in writing; oral arguments will not be heard.

RULE 20. Motions Based Upon Matters Not Appearing of Record.—When a motion is intended to be based on matters which do not appear by the record, the facts must be disclosed and supported by affidavit.

RULE 21. Oral Arguments Not to be Heard on Motions.—Oral arguments will not be heard upon any motion, nor upon the rehearing of a cause unless specially directed by the court.

SECURITY FOR COSTS.

RULE 22. Rule Upon Non-residents.—Upon filing an affidavit that any plaintiff in error is not a resident of this State, and that no bond for costs has been filed, a rule shall be entered against him, of which he shall take notice, to show cause why the writ shall not be dismissed.

ABSTRACTS.

RULE 23. Abridgment of the Record—Bound in Pamphlet Form.—In all cases, the party bringing a cause into this court, shall furnish a complete abstract or abridgment of the record therein, referring to appropriate pages of the record by numerals on the margin, and shall cause such abstracts to be printed in a neat and workmanlike manner, with small pica type and leaded lines, on one side only, upon white paper; *such abstracts shall be bound in book or pamphlet form.* Five copies of such printed abstracts shall be filed in each case— one for each of the judges, one for the defendant in error or appellee, and one to be filed with the record, and in addition thereto, one copy of such abstract shall, as soon as printed, be delivered or sent by mail, properly addressed, to the opposite counsel, and proof thereof shall be made and filed, either by the receipt of such counsel or by affidavit of the fact.

RULE 24. Defendant May Furnish Additional Abstract.—The defendant's counsel shall be permitted, if he is not satisfied with the abstract or abridgment furnished by the

plaintiff's counsel, to furnish such further abstract as he shall deem necessary to a full understanding of the merits of the case.

Costs to be Taxed.—Upon printed abstracts being furnished in conformity to the rules of this court, it shall be the duty of the clerk to tax a printer's fee at the rate of twenty cents for each one hundred words of one copy of such abstract, against the unsuccessful party not furnishing such abstracts, as costs, to be recovered by the successful party furnishing the same.

BRIEFS.

RULE 25. Forms and Requisites.—Printed briefs will be required in all cases, whether argued orally in full, or in part only, or when submitted on briefs without oral argument. The briefs required should contain a short, clear statement of the points, and the authorities in support thereof; and in citing cases from published reports, counsel will be required not only to give the book and page, but also the names of the parties as they appear in the title of the reported case; and the names of counsel filing brief or abstract must appear to the same. But the filing of a printed brief shall not preclude the party from filing full printed or written arguments in support of his brief of points and authorities, provided he does so within the time his printed brief is required to be filed. The brief of appellant or plaintiff in error shall contain in the beginning a concise statement of the case, including in a general way, the form of action, the substance of the pleadings without detail, the substance of the evidence (omitting names of witnesses and all other details), the judgment, and the rulings of the trial court complained of. The opposite party will be deemed to accept such statement as correct, except so far as he may indicate by a separate statement of his own to be contained in his brief. *Briefs shall be in book or pamphlet form.*

RULE 26. Five Copies in Each Case.—Five copies of the brief must be filed in each case, one for each of the judges, one for the opposite party, and one to be filed with the

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record, and in addition thereto, one copy of such brief shall be supplied to opposite counsel as and in the manner provided by Rule 23, and proof thereof made and filed.

DOCKETING AND HEARING.

RULE 27. People's Causes to have Preference.—Causes in which the people are a party, and in which they have a direct interest in the decision, shall be placed at the head of the docket; all other cases shall be docketed and called for argument in the order in which the records shall have been filed with the clerk.

CALL OF DOCKET—EXPIRATION OF RULES.

RULE 28. Call of the Civil Docket.—The civil docket shall be called numerically, and the causes shall be argued, continued, or otherwise disposed of, as they are called, unless, for good cause shown, they be placed at the foot of the docket; all unexpired rules will terminate upon the call of the cause for hearing; *Provided*, That if the court shall give time to either party without the consent of the other, the cause shall not lose its precedence on the docket.

CALL OF DOCKET—FILING ABSTRACTS AND BRIEFS.

RULE 29. Filing Briefs and Abstracts.—Hereafter the docket shall be called and abstracts and briefs filed, as follows:

1st. All cases where the record shall be filed with the clerk not less than twenty days prior to the first day of the term, and all causes continued from a former term shall be subject to call at the rate of twenty cases per day on and after the first day of the term, and the plaintiff in error or appellant shall file his abstracts and briefs at least *twelve days prior* to the first day of the term; and the defendant in error, or appellee, shall file his briefs at least one day prior to the first day of the term.

2d. When the record shall be filed within twenty days, but not less than ten days prior to the first day of the term, such causes shall be subject to call at the rate of twenty

cases per day on and after the second day of the term, and the plaintiff in error or appellant shall file his abstracts and briefs with his record; and the defendant in error or appellee shall file his briefs at least one day before the cause is subject to call.

•3d. The call of other cases on the docket will begin on the third day of the term, at the rate of twenty per day, and in such cases the abstracts and briefs of appellant or plaintiff in error must be filed in the clerk's office on or before the time required for filing the transcript of the record. The appellee or defendant in error shall file his brief * within ten days thereafter, and the reply briefs thereto shall be filed within five days after such time, unless the time for filing such abstracts and briefs shall, for good cause shown, be extended.

4th. In other cases coming under Section 72 of the Practice Act, the rule last above mentioned shall apply to the filing of abstracts and briefs, and such cases shall be subject to call as soon as records are filed.

RULE 30. Failure by Plaintiff to File Abstracts or Briefs.—If the plaintiff in error or appellant shall fail to file either his abstracts or briefs with the clerk within the time prescribed by the rules of this court, the judgment or decree of the court below will be affirmed on the call of the docket, unless the time for filing the same shall be extended for cause shown.

BRIEFS AND ABSTRACTS.

RULE 31. Failure by Defendant to File Brief.—If the defendant in error or appellee shall fail to file his brief in compliance with these rules, the judgment or decree will be reversed *pro forma*, unless the court on examination of the record shall deem it proper to decide the case on its merits.

RULE 32. Oral Arguments.—On the calling of a case for hearing, it may be argued orally, *unless by order of the court the argument is set for another day*, if the rules for

* This brief must be filed within ten days after the filing of abstract and brief of appellant or plaintiff in error.

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filing abstracts and briefs have been complied with, or the case may be submitted on such abstracts and briefs, and the cause, in either case, shall then be taken for final determination, but in case the appellant or plaintiff in error does not argue the cause orally, he shall be allowed three days, after the call, to file a brief in reply.

RULE 33. Time Allowed for Oral Arguments.—The time allowed for each oral argument shall be restricted to one hour, on each side, unless otherwise specially permitted. *Provided*, if appellant or plaintiff in error makes no argument, then if appellee or defendant in error desires to be heard, he will be limited to twenty minutes.

DAMAGES ON DISMISSING APPEALS.

RULE 34. Failure to File Record—Damages.—When appeals from decrees, judgments or orders for the recovery of money, are dismissed by this court for want of prosecution, or for failing to file authenticated copies of records, as required by law, the court will award damages against the appellant, at ten per cent upon the amount recovered in the court below, if it be less than one hundred dollars, and at five per cent upon the amount of such recovery, if it equals or exceeds that sum.

REHEARING.

RULE 35. Application Notice.—Application for a rehearing of any case shall be made by petition to the court signed by counsel, briefly stating the grounds for a rehearing, and the authorities relied on in support thereof. When a rehearing is granted, the clerk shall at once give notice to the opposite party of the date when such rehearing was granted.

RULE 36. Practice—Manner of Applying.—The manner of applying for a rehearing shall be as follows:

Within fifteen days after a decision is announced a party applying for a rehearing shall give actual notice in writing to the opposite party, or his attorney, of his intention to make such application, and within thirty days after the de-

cision is announced shall place on file in the clerk's office five printed copies of his petition. Petitions for rehearing will be entertained in that class of cases only in which the decision of this court can not be reviewed by the Supreme Court, unless this court, in the exercise of its discretion, shall, in exceptional cases, determine to the contrary. When, in any case, a rehearing is granted, it shall be placed for hearing at the foot of the docket. The petition for rehearing shall stand as the printed arguments, on the hearing of the party in whose favor it is granted. The opposite party shall, in all such cases, have ten days from the time of granting the rehearing to reply to the petition, and the petitioner shall have five days thereafter to file his reply thereto.

RULE 37. Supersedeas on Re-argument.—Any two of the justices of this court may in vacation issue an order which shall operate as a *supersedeas* in any case which has been submitted to this court for hearing and judgment, whenever a re-argument of the same shall, in their opinion, be advisable.

RULE 38. Decision in Vacation—Rehearing.—Where a decision in any case is rendered in vacation, and a petition for rehearing shall be presented to either of the justices of this court, if he shall certify that there are probable grounds for granting a rehearing, all further proceedings, authorized by the judgment of this court, shall be stayed until the next term thereof.

APPEALS AND WRITS OF ERROR.

RULE 39. Practice—Applications in Vacation and in Term Time.—In all cases where an application is made in vacation for an appeal from this court to the Supreme Court, the party making such application shall present to one of the judges of this court a brief statement in writing, giving the title of the cause, the nature and amount of the judgment, order or decree from which the appeal is desired, the date of the rendition of such judgment, order or decree, and the name of the security proposed, accompanied with an affidavit showing the solvency and sufficiency of the

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security so proposed. When the application is made to the court in term time the same statement and affidavit will be required.

EXECUTIONS—PROCEDENDOS.

RULE 40. When to Issue.—Executions may issue from this court on judgments affirmed, or a writ of procedendo shall issue upon the payment of costs made in this court by the successful party.

ADMISSION TO PRACTICE LAW.

RULE 41. Examination of Applicants.—The examination of applicants for license to practice law will be made on the first day of each term of this court. The rules of the Supreme Court, printed herewith, are referred to as to the requirements for admission to practice law in this State.

RULE 42. Applicant May Withdraw Certificate and Affidavit.—Each applicant for examination to be admitted to the bar, may be permitted after the examination is over, to withdraw his certificate of good moral character and affidavit showing that he is over twenty-one years of age and a citizen of this State, for the purpose of presenting the same to the Supreme Court with his certificate of examination.

RULES OF THE SUPREME COURT OF ILLINOIS FOR LICENSING ATTORNEYS.

RULE 45. Application for Admissions—What is Required.—Every application for license to practice law in the courts of this State, except those who apply for admission upon a license granted in another State, or upon a diploma issued by a law school of this State, shall present to one of the Appellate Courts, in term time, proof that he has pursued for the period of two years the same course of law studies prescribed for students in any of the regularly established law schools in this State, or a course of law studies equivalent thereto, naming the books studied, and that such law studies have been pursued under the direction

and supervision of one or more licensed lawyers, or firms of lawyers, and that the applicant has submitted to satisfactory examinations by such lawyer or lawyers, or firm or firms of lawyers, at convenient intervals during such period of study covering progressively the entire course studied, such proof to consist of the affidavit of the applicant, and also of the certificate or certificates of the lawyer, lawyers or firms under whose direction and supervision such studies have been pursued; or, if in consequence of the death or absence of such lawyer or lawyers, his or their certificate can not be procured, its place may be supplied by the affidavit of any credible witness having knowledge of the facts: *Provided, however,* that the time employed as a law student in any established law school shall be considered a part of the two years, of which the court shall be satisfied by the affidavit of the applicant and the certificate of the secretary or one of the professors of such law school.

RULE 46. Manner of Proceedings.—Upon the presentation of such affidavits and certificates to any of the Appellate Courts, in term time, such court may, at such convenient time as it shall designate by an order or rule of court, examine in open court the applicants so presenting them for admission to the bar; and shall certify, under the seal of court, the fact of such examination and the names of those whom they shall find entitled to admission to the bar, to this court. Licenses will be hereafter issued by the judges of this court, in term time, on such certificates. *Provided,* that each of such certificates be accompanied by the affidavit of the applicant, or some other reputable person, that he is of the age of twenty-one years, or above, and a citizen of the State, and also a certified transcript from a court of record in this State showing that he is a man of good moral character. An applicant who shall, upon examination as aforesaid, by the Appellate Court, be rejected, shall not be permitted to re-examination until the next regular term of the Appellate Court in which he was so examined and rejected.

RULE 47. Licensing Attorneys Upon Diploma.—A diploma regularly issued by any law school, regularly organ-

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ized under the laws of this State, whose regular course of law studies is two years, and requiring an actual attendance by the student of at least thirty-six weeks in each of such years, may be received and acted upon in the place and stead of the examination in open court, required by Rule 45; but every application for admission to the bar, made on behalf of any person to whom any diploma, as aforesaid, has been awarded, must be made in term time, by motion of some attorney of this court, supported by the usual proofs of good moral character and the production in court of such diploma, or satisfactorily accounting by affidavit for its non-production; and in all cases when the diploma on which the application is based does not recite all the facts requisite to its reception, all such omitted facts must be shown by the affidavit of the applicant, or some officer of the law school, or both.

RULE 48. Licensing Attorneys from Other States.—Any application for admission to the bar, based upon a license granted in another State, must be made in term time by motion of some attorney of this court, made in open court, and no applicant will be admitted upon such license without examination, except it appear to the court by affidavit or otherwise, that in the State in which the license was issued, a course of study was required at least equal to that prescribed in this State by the 45th rule, or that the applicant has been engaged in active practice for a period of two years under license.

RULE 49. Licenses—By Whom Issued.—Licenses which may be granted upon such applications may be prepared for signature of the judges by the clerk of the grand division in which the order of admission shall be made.

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